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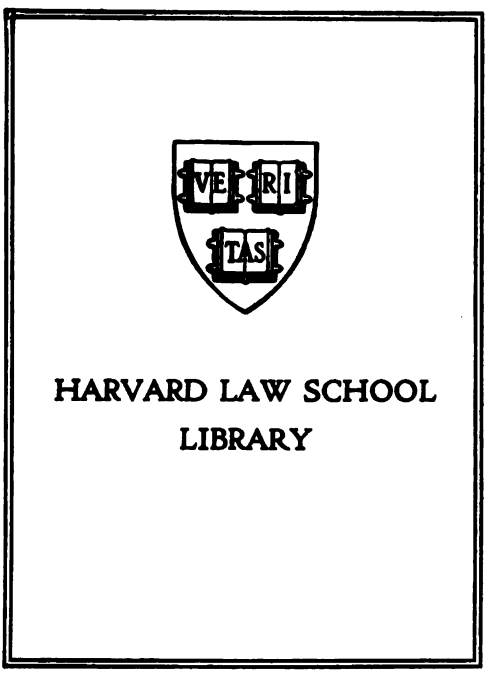

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New York (State) Courts

OFFICIAL EDITION

THE MISCELLANEOUS REPORTS of

CASES DECIDED IN THE COURTS OF RECORD OF THE STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court

WILLIAM V. R. ERVING, REPORTER

VOLUME CXVII.

1922

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THE
MISCELLANEOUS REPORTS
OF THE
STATE OF NEW YORK
COMMENCING NOVEMBER, 1921.

In the Matter of the Construction of the Last Will and Testament of CHARITY C. MOULD, Deceased.

(Surrogate's Court, Westchester County, November, 1921.)

Wills — construction of — when general legacies will not be charged against real estate — relationship of parent and child as to residuary devisee outweighs any intent which might be inferred by reason of a power of sale.

An intention to charge real estate with the payment of legacies will not be inferred if decedent may have been mistaken in her judgment as to the value of her property or was in reasonable expectancy of increasing her personal estate before her death.

The primary fund for the payment of general legacies is the personal estate unless the will expressly declares otherwise, or a clear intention to the contrary is to be gathered therefrom, which may be aided by extrinsic evidence; if the contrary intention is not expressed in the will, then it must be clearly and satisfactorily inferred.

An intention to charge the real estate of a testatrix will not be inferred from a disparity between the amount of the estate and the legacies, if the testatrix might have been unconscious of its existence, or mistaken in her judgment.

As between a power of sale in a will being a basis for a charge of legacies upon the real estate and the existence of the relationship of parent and child as showing an intention not to create such a charge, the latter is of controlling importance and an outweighing factor on the question of the intent of the testatrix.

Decedent, most of whose property was acquired under the will of her late husband, died at the age of seventy-six years,

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leaving her surviving no children of her body or descendants of any such. After certain general legacies, amounting to $40,500, not specifically charged upon her real estate, to her sister, nieces and nephews and to relatives of her deceased husband, all the rest, residue and remainder of her estate, both real and personal, was devised and bequeathed to "Florence A. Coombs, who grew up as a child in my family and lived with me for many years, the same to have and to hold forever," and the executor was given full power of sale over the real estate. When the will was executed, about fifteen months before the death of testatrix, exclusive of 20,000 shares of the United States Tin Company of the par value of one dollar per share, and certain mining stock which had not been transferred from her husband's name, the personal estate of testatrix amounted to about $25,000. Without testimony as to the intention of testatrix it was stipulated by all parties in interest that both at the date of the will and also at the date of the death of testatrix, the stock in both corporations had no value. The residuary legatee was a second cousin of testatrix, and from the time she was two years old stood in the mutually acknowledged relationship of parent and child to both the testatrix and her husband, was educated by them at private schools and at her marriage at the home of decedent was given a large wedding. Certain of the other legatees, relatives of decedent's husband, also lived with her for a while but not in the relationship of parent and child. *Held*, that the burden of proof resting upon the general legatees to show that it was the intent of testatrix to charge their legacies upon her real estate, had not been sustained, and it is accordingly decreed that said legacies are not a charge upon the real estate left by decedent.

APPLICATION for the construction of a will.

C. Bertram Plante (George H. Taylor, Jr., of counsel), for Florence A. Coombs.

Thomas J. Towers, for executor.

Frederick F. Close, special guardian.

SLATER, S. This is an application for the construction of the will of Charity C. Mould, deceased, made

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by the executor. The question involved is whether the legacies given by the said will are a charge on the real estate of which the testatrix died seized. Charity C. Mould died May 22, 1920, aged about seventy-six years, without leaving children of her body, or their descendants. The will was executed February 5, 1919. She was the widow of Horatio D. Mould, who died May 2, 1899. It appears that most of her property was acquired under the will of her late husband. The will in question first directs the payment of all the debts, funeral expenses, and expense of administration. It then gives general legacies to a sister, nieces and nephews of decedent, and to relatives of her late husband, amounting in all to about $40,500. They are not specifically charged upon the real estate. By the 9th clause, the following gift is made in these words: "All the rest, residue and remainder of my estate, both real and personal, of whatsoever nature and kind, including my lot in Greenwood Cemetery, I give, devise and bequeathe to Florence A. Coombs who grew up as a child in my family and lived with me for many years, the same to have and to hold forever."

The 10th clause gives to the executor full power and authority to grant and sell and convey all, or any part of the real estate, with full power to execute and deliver all deeds.

The entire estate, real and personal, consists of approximately $40,000 in live assets, divided as follows: personal estate, about $20,000, consisting of money in bank, stocks, bonds, mortgages and jewelry; and equity in real estate, about $20,000 not specifically devised. She had among her securities at the date of the will 20,000 shares of the stock of the United States Tin Company of the par value of one dollar per share, and 200 shares of the stock of the Spenazuna Gold Mining Company. These stocks were found in the

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decedent's strong box, with the jewelry. The mining stock, however, had not been transferred from the husband's name. A formal indorsement is not necessary. *Orton* v. *Tannebaum,* 194 App. Div. 214, 223.

It appears that at the date of the will the personal estate, exclusive of the above-mentioned shares of stock, amounted to about $25,000. It has been stipulated by the parties hereto that there was at the date of the will, and also at date of death, no value to the shares of stock of the United States Tin Company and the mining company. But no one can stipulate the decedent's intention; nor as to what the decedent may have thought these shares of stock added to her estate. No testimony was adduced upon this point. An intention to charge real estate will not be inferred, if decedent may have been mistaken in her judgment as to the value of her property, or in reasonable expectancy of increasing her personal estate before her death. *Carley* v. *Harper,* 219 N. Y. 295.

Florence A. Coombs, the residuary legatee, was a second cousin of the decedent and stood in the mutually acknowledged relationship of parent and child to both the decedent and her husband from the time Mrs. Coombs was two years of age. It is also true that certain legatees, relatives of decedent's husband, lived with her for a while, but not in the relationship of parent and child.

It is well settled that the primary fund for the payment of general legacies is the personal estate, unless express direction is otherwise found in the will, or there be clear intention to the contrary to be gathered from the provisions of the will which may be assisted by extraneous evidence. *McCorn* v. *McCorn,* 100 N. Y. 511; *Lediger* v. *Canfield,* 78 App. Div. 596; *McGoldrick* v. *Bodkin,* 140 id. 196.

The whole question is one of intent, to be searched

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for in the light of adjudged cases, but to be determined after all from the language of the will and the circumstances surrounding the testator. *Wiltsie* v. *Shaw*, 100 N. Y. 191; *Carley* v. *Harper*, 219 id. 295.

If the intention is not expressed in the will, then it must be clearly and satisfactorily inferred. *Lupton* v. *Lupton*, 2 Johns. Ch. 614; *Lediger* v. *Canfield*, *supra*. As is the case with all questions of intention, no precedents are absolutely controlling in other cases, for all differ.

The testimony in the instant case was to the effect that the testatrix was childless, that in 1880 Florence A. Coombs, a second cousin, a blood relative, an orphan, the residuary legatee and devisee, was taken into the family at the age of about two years. She grew up as a child of the testatrix and her husband, and was subject to their control. In return the decedent received filial attention and service. The will referred to her in this manner: "Florence A. Coombs who grew up as a child in my family and lived with me for many years." Mr. and Mrs. Mould maintained and educated her at private schools. She was introduced as the daughter, was married at the home of the decedent, and was given a large wedding. Testatrix treated her as her child, and was responsible for her support. The relationship of affection continued to the time of her death. By reason of such facts the legatee sustained to the decedent the relation of a child. *Matter of Beach*, 154 N. Y. 242; *Matter of Davis*, 184 id. 299; *Matter of Lloyd*, 166 App. Div. 1; *Matter of Downey*, 182 N. Y. Supp. 223; *Matter of Chambers*, 112 Misc. Rep. 551; *Matter of Wheeler*, 1 id. 450.

An intention to charge the land will not be inferred from a disparity between the amount of the estate and the legacies, if the testatrix might have been uncon-

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scious of its existence, or mistaken in her judgment. *Briggs* v. *Carroll*, 117 N. Y. 288, 292.

The testimony did not disclose that the testatrix knew, or comprehended, or believed that her personal estate was insufficient to pay the legacies. On this point, the court has failed to be illuminated. Therefore, we cannot now conjecture.

The mere fact of giving legacies only imputes a general purpose that legacies given shall be paid and amounts to little, when the residue of the estate given is a substantial vital gift to persons by nature the objects of the bounty of the testatrix.

The residuary clause gives the balance of the estate "*both real and personal*" to Mrs. Coombs. If the testatrix knew, or realized, or comprehended that her personal estate was, or would be insufficient to pay the general legacies, what did she mean when she gave in the residuary clause, "the rest, residue and remainder" of her "*personal* estate?" If she understood that there would be no personal estate to pass to Mrs. Coombs, and intended the real estate to be sold to assist in the payment of the general legacies, she must be charged with executing a mocking and a meaningless will to this extent, which upon its face gave something to one near and dear to her. Is it not apparent that she thought, and in fact intended, that after the legacies were paid she would have personal estate left, this to pass under the residuary clause to the child? The very words of gift of the "personal" estate in the residuary clause negative any intention that may be claimed for her that she meant to have the real estate sold to pay the general legacies. It fortifies and makes her intention clear that she really intended Mrs. Coombs to have the real estate, plus the personal estate that she thought would be left after the payment of the general legacies.

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The courts have gathered from the presence of a power of sale of real estate otherwise unnecessary, and the blending of real and personal property in the residuary clause, as sometimes helpful to the general legatees in the light of the circumstances. The value of the latter clause is slight. *Carley* v. *Harper,* 166 App. Div. 473, 478; affd., 219 N. Y. 295. These are circumstances merely, and each will must be considered by itself in its entirety. *Matter of City of Rochester,* 110 N. Y. 159. If the will is drawn by a competent lawyer, the failure expressly to charge the legacies upon real estate should be, but perhaps is not, as significant a circumstance as any. *Carley* v. *Harper, supra.* It appears that a competent attorney drew the will of the decedent.

In solving similar problems, the relationship of the beneficiaries has been of most vital concern to the courts. Let us analyze the cases to find the reasoning which led to the opinion of the courts. The two major reasons pervading all the cases are the existence of a power of sale in the will, and the fact of the general legacies or residuary gifts being to persons of the blood, or to those who have stood in the mutually acknowledged relationship of parent and child. In *Taylor* v. *Dodd,* 58 N. Y. 335, the will contained a power of sale. The question of kindred, or parental duty did not enter into the case. The real estate was charged. In *Kalbfleisch* v. *Kalbfleisch,* 67 N. Y. 354, the will contained a power of sale and the testatrix owed a parental duty to the general legatees. The real estate was charged. In *Hoyt* v. *Hoyt,* 85 N. Y. 142, the will contained a power of sale, and there were kindred of the blood as general legatees, as well as residuary legatees. The real estate was charged. In *Scott* v. *Stebbins,* 91 N. Y. 605, the will contained a power of sale and the general legatee was the son. The real

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estate was charged. Thus, in those cases which based the charge upon the existence of a power of sale, the general legatees in whose favor the charge was made were always of the kindred, and those who had done faithful service and kindness to the decedent.

I find no case, however, creating a charge on real estate, based on the ground of a power of sale contained in the will, where the *residuary legatee was of the blood, or who stood in the relationship of parent and child.* This is not to be overlooked. Thus, the instant case contains a new state of facts, upon which the courts have not ruled. In *Bevan* v. *Cooper,* 72 N. Y. 317, and *Brill* v. *Wright,* 112 id. 129, the court held that the legacies were not a charge, the residuary legatees being of the kindred of the testator. The wills, however, did not contain a power of sale. The significant fact is disclosed that (1) in every case where the charge is made the *general legatees* were of the kindred of the blood; and (2) in every case where the charge is not made the *residuary legatees* were of the kindred of the blood. In the former category are included the cases of *Kalbfleisch* v. *Kalbfleisch, supra; Scott* v. *Stebbins, supra; McCorn* v. *McCorn,* 100 N. Y. 511; *Briggs* v. *Carroll,* 117 id. 288. In the latter category are included the cases of *Bevan* v. *Cooper, supra,* and *Brill* v. *Wright, supra.*

With relation to intent, in *Scott* v. *Stebbins,* 91 N. Y. 605, the court said, referring to *Lupton* v. *Lupton,* 2 Johns. Ch. 614: "In that case the *residuary devisees were the children* of the testator, and the legatees were his grandchildren, a fact which might, and no doubt did, have a controlling effect upon the mind of the testator and upon his intention *not to make the real estate chargeable with the legacies.* * * * There is a marked distinction between that case and the one at bar. The *legatee* here was one of the *tes-*

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tator's sons, and the devises to him and to the other son in connection with the amount of the legacy to each and the reason given for fixing the same evinces an intention to make both equal. * * * it raises the presumption that the testator designed the real estate should be made chargeable with the payment of the legacies."

In *Bevan* v. *Cooper,* 72 N. Y. 317, where the gifts were to the wife and children of testator and were contained in the residuary clause, the court said in refusing to charge the general legacies upon the land: "It is of much moment, too, that the residuary clause provides for those who had a claim upon his forethought — his widow and his children — while the legacies sought to be charged are to strangers to his own blood, and having no claim upon him, unless it be that of * * * relationship to a first wife. * * * We should be slow to infer, that a testator meant to prefer legatees standing in such a position to him and to his property, to his widow and to his and her children."

In *Brill* v. *Wright,* 112 N. Y. 129, 135, the court said: "The legatee was of kindred to the testator, and the residuary devisees and legatees were strangers in blood. *But they became members of his family when they were children, and lived with him until his death, one for the period of twenty, and the other for twenty-five years."* The court held that the general legacies were *not* a charge upon the real estate. In *McGoldrick* v. *Bodkin,* 140 App. Div. 196, 199, Justice Carr said: "Running throughout many of these cases we find at times a strong tendency upon the part of courts to charge the legacy upon the lands in favor of legatees who were of the blood of the testator and thus presumed to be "the natural objects of his bounty," *and*

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we find this tendency to be less strong in cases of legatees who were strangers in blood."

In *Harvey* v. *Kennedy*, 81 App. Div. 261, the legacies were to sisters, the residuary estate passed to the daughter, and the court refused to charge the legacies on the real estate.

In *Wellbrook* v. *Otten*, 35 Misc. Rep. 459, Justice Russell said, referring to the testator: "His union with Mrs. Hulseberg had proved childless and neither had any descendants. He had taken the plaintiff when but a few months old and reared her as he would a daughter, both he and his wife giving her the appellation of adopted daughter. She stood to both of them as a child, and had no other home than theirs, until she was married. Apart from his wife there was no one so close to him in the tender ties of daily companionship and deliberately assumed fathership. He took no steps to legally adopt the plaintiff, doubtless knowing that he meant to provide for her by testament. There seems to have been no interruption in his loving regard for the plaintiff." This last statement might very well be made in the instant case, covering the relationship which existed between the decedent and the adopted daughter. Justice Russell in this case held that the gift of the legacy to the adopted daughter was a charge upon the real estate, and said: "The extrinsic situation, therefore, both as to condition of his property, his wife's property and the claims of those properly and in fact the natural recipients of his bounty, which was present in the mind of the testator in making the will and the codicil, *renders as certain as the evidence of circumstances can afford, the presumption that the testator meant that when his wife died this daughter and brother should receive the full benefits he had planned to give them.*"

In *Carley* v. *Harper, supra*, the court said that the

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relation of the beneficiaries of the will to the testator is not to be overlooked and the presumption favors children rather than strangers.

In *Matter of Noe,* 94 Misc. Rep. 63, Surrogate Fowler reflected this same thought when he said: "She had no immediate relatives who would be the natural objects of her bounty; there was no one dependent upon her whom she would be under an obligation to support. Her legatees were personal friends, charitable or religious corporations and persons remotely related to her. There would therefore be no controlling reason for the discrimination in favor of the residuary legatees which a construction limiting the payment of the pecuniary legacies to the personal estate would necessarily imply * * *. Neither of the residuary legatees was the natural object of her bounty; one was a corporation, the other merely a friend. There is nothing in the will which would indicate an intention on the part of the testatrix to prefer these legatees to the thirty other legatees to whom she had bequeathed various sums, and there is no reason extrinsic of the will which would justify or explain such a preference."

Likewise, Surrogate Foley, in *Matter of Obst,* 115 Misc. Rep. 711, holds that the courts will take note of the relationship of a legatee as a controlling factor, when he said: "The legacy of the income on $3,000 in trust for the benefit of Marietta Kerns, the widow of the deceased son of the testatrix, is a specific legacy. *Matter of Matthews,* 122 App. Div. 605. It also partakes of the nature of a demonstrative legacy, being payable out of a specified fund. *Crawford* v. *McCarthy,* 159 N. Y. 514. In either case it is entitled to a preference. The daughter-in-law resided with the testatrix, and appears to have been a special object of her bounty. No other provision was made for her.

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The codicil contains a clear and unequivocal expression of the testatrix's intention to prefer this legacy to the widow of her son over any of the others. *Matter of Lloyd,* 166 App. Div. 1. This legacy should therefore be paid in full."

Also Justice Clarke in *Bly* v. *Bly,* 163 App. Div. 320, 333, said: "No natural objects of the testator's bounty, widow, children, or descendants, clamor to us to mark this venerable and public-spirited man as enacting a practical joke at the edge of his grave." The case of *Richardson* v. *Richardson,* 145 App. Div. 540, Justice Rich writing, also affirms the same principle. Surrogate Schulz, in *Matter of Gaffney,* 109 Misc. Rep. 397, declined to hold that the devise of real estate given to the daughter should in any manner be cut down.

Thus, the major reason created by blood and relationship existing for many years, as parent and child, is a powerful reason, whether such person be a general legatee, or a residuary legatee.

The cases of *Carley* v. *Harper, supra,* and *Ely* v. *Megie,* 219 N. Y. 112, may well be distinguished from the instant case. In the former case the will contained a direction to pay the transfer tax from the residue, suggesting that the legacies should be paid in full. Also in the *Carley* case the trial court found that when she made her will, the testatrix knew or believed she possessed a certain amount of personal property. That has not been shown in the instant case. The relationship of the beneficiaries to the testator did not exist in *Ely* v. *Megie, supra.* In *Carley* v. *Harper, supra,* relatives of the blood took as general legatees, as well as residuary legatees. The question of disinheriting, or discriminating against a child was not involved in either of these cases.

It was stated by Judge Hogan in *Ely* v. *Megie, supra,*

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that a gift to legatees would indeed be a "mockery and an absurdity" with an inadequate fund from which to pay the legacies. In the instant case then, we certainly have a double mockery. If the real estate is charged with the payment of the general legacies, it would result in causing the gift to the child to be valueless, and the words of gift of the testatrix "nugatory and unavailing." She would receive nothing, "less than equity suggests as her share." It is very noticeable that in all the cases dealing with the subject a preference is given to relatives of the blood, and particularly to persons who stand in the relation of parent and child, rather than to strangers, relatives of less degree, or to charitable corporations. Where those standing in these positions to the decedent are the residuary devisees, the courts have consistently refused to charge their gifts with the payment of the general legacies. Seemingly, the courts are slow to infer a preference against those standing in this relationship. Where this class are named as general legatees, then the courts have consistently held that such gifts are a charge upon the real estate. This distinction is expressive. The courts have struggled to find a reason for holding in favor of a child. *Lupton* v. *Lupton, supra; Taylor* v. *Dodd,* 58 N. Y. 335; *Kalbfleisch* v. *Kalbfleisch,* 67 id. 354; *Bevan* v. *Cooper,* 72 id. 317; *Hoyt* v. *Hoyt,* 85 id. 142; *Scott* v. *Stebbins,* 91 id. 605; *McCorn* v. *McCorn, supra; Brill* v. *Wright,* 112 N. Y. 129; *Briggs* v. *Carroll,* 117 id. 288; *Morris* v. *Sickly,* 133 id. 456; *Irwin* v. *Teller,* 188 id. 25; *Carley* v. *Harper, supra; Ely* v. *Megie, supra; McGoldrick* v. *Bodkin,* 140 App. Div. 196; *Lediger* v. *Canfield,* 78 id. 596; *Wellbrook* v. *Otten,* 35 Misc. Rep. 459.

It would appear that persons of the blood and those who stand in the position of parent and child, and persons dependent upon the deceased are preferred by

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the court because they do not come within the general rule of "mere bounty." To my mind it is a material circumstance, far outweighing any other, in considering the general intent of the testatrix, that the residuary legatee stood in the mutually acknowledged relationship of parent and child. Such a preference is acknowledged in the Transfer Tax Law, Laws of 1909, chapter 62, section 221A. There is, too, the canon of construction that where there are two equally probable interpretations of the language of a will, that one is to be adopted which prefers the kin of a testator to strangers, and, in doubtful cases, the courts will favor those dependent upon a person's natural bounty. The circumstances relating to the life of Mrs. Coombs, her bringing up, her education, her marriage, in fact her status in the family life, are all circumstances most material in differentiating the gift to her from the class of "mere bounty." Mrs. Coombs was the only person who sustained to the decedent in her lifetime the relation of a child. She became in tender years the object of the testatrix's solicitude and providing care. She was practically adopted by her. *Matter of Chambers,* 112 Misc. Rep. 551. The child was dependent upon her. When a child is adopted from its own natural environments into the home, a burden is assumed. Most people pour out to such a child a generous supply of love and affection, sometimes far exceeding what would naturally flow to one's own natural offspring. The extra care, devotion and love is evidence of a desire to cause the child to be bettered by the change of home conditions. I cannot think that Charity C. Mould ever intended to mock this child with a valueless bequest, giving her only "my lot in Greenwood Cemetery," in later years to house her body. The design on the part of the testatrix to have the legatee first die, before the realization of the

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inheritance, would be a monumental farce. From the evidence adduced she was not a woman who could, or would knowingly do this. To her the position she held toward this child had been and was sacred. She would not have seared her soul upon the edge of the grave with so cruel a fraud. She never intended to indulge in a bequest to her, both useless and vain. It not only would be shallow, but contemptible. The residuary clause contains the only provision for this adopted child. It cannot be treated as a cautious final provision to guard against intestacy. It is of much moment that the residuary clause provides for one who had a claim upon her forethought. Probably the testatrix never conceived of the situation which now presents the real difficulty. The will has every appearance of an intention to have something left for Mrs. Coombs, because the testatrix then believed her fortune large enough for all her testamentary purposes. In order to hold that the legacies were charged upon the real estate, it must appear that the question did present itself to the testatrix, and that she intended that they should be so charged. Whether or not Mrs. Mould knew that the personal estate was insufficient to pay the legacies, this court cannot say, the testimony upon this point was very meagre — but it can say that from all the surrounding circumstances is revealed the intention not to make a thimble-rig bequest to an adopted child and a gift throughout false, artificial and valueless. The gift was not made entirely from good will, but from a sense of parental obligation. This intent would fail in this case if the legacies were charged upon the real estate.

To sum up: In the instant case we have the basis for a decision in favor of the legatees; the power of sale, and the blending of the real and personal property in the residuary clause. In favor of the residuary

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legatee, we have the will being drawn by a competent attorney, and the relationship existing between the decedent and the child. Which is the paramount reason for sustaining the testatrix's intention in the instant case? It has been said that "The paramount desideratum in every case on wills should be an equitable determination."

The two principal reasons which courts have used in arriving at the intention of testators, are in the instant case on opposing sides. It cannot be well said that the power of sale expresses the full intention of the decedent in the absence of expressed direction, and that it can be "fairly or satisfactorily inferred" or is "clear" or is "clearly inferred" or is "clear and manifest." *Lediger* v. *Canfield*, 78 App. Div. 596. Judge Thomas, in *Carley* v. *Harper*, 166 App. Div. 473, 478, regarding the weight to be given a power of sale clause, says: "And yet, such an authority is so commonly a conventional part of a will that its influence may be inconsiderable. The same is true of the mention of real estate and personalty in the residuary clause." In *Matter of Lummis*, 101 Misc. Rep. 258, 270, Surrogate Fowler in speaking of the situation of the rule at the present time, with reference to *Carley* v. *Harper*, *supra*, says: "The blending * * * of a power of sale and the direction to pay inheritance taxes out of the residuary estate, while worthy of consideration, are never absolutely controlling in determining charges on land. Those circumstances are frequently referred to in the opinions of appellate courts, but the dominating factor has always been the amount of personalty on hand at the time the will was executed. In the case now before the surrogate the usual argument is predicated of the existence of a power of sale, the blending of the realty and personalty in the residuary clause and the direction to pay

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the inheritance taxes. The contrary argument, in favor of the contention of the widow, is just as strong, based upon these same premises. A power of sale is often put in a will because the precedents will have it so and because such a power may in some way at times prove valuable. The express direction to pay the taxes out of the residuary estate may be regarded as an indication that the legacies themselves were not so payable, especially where the will was drawn by an attorney. The blending of realty and personalty in a residuary clause was stated in *Brill* v. *Wright, supra*, of itself not to be a dominant consideration. *Irwin* v. *Teller*, 188 N. Y. 25."

The one fact alone, the relationship in blood, and standing in the mutually acknowledged relationship of parent and child is enough to tip the scale in favor of the residuary legatee in the instant case. By the very compelling nature of the reasoning in favor of those who have from infancy maintained the mutually acknowledged relationship of parent and child, the court feels that it must hold for the residuary legatee. Every intendment is in favor of the adopted daughter, the natural object of the testatrix's bounty. In my opinion, the burden has not been sustained by the general legatees to show the intent of the testatrix to charge the general legacies upon the real estate. In weighing all the reasons for and against the contention to charge the real estate, I find the circumstances of kindred, living in the relationship of parent and child, and the life of Mrs. Coombs to far outweigh all other circumstances found in this case. As between a power of sale in a will being a basis for a charge of legacies upon real estate, and the existence of the relationship of parent and child, showing an intendment not to create such a charge, I shall hold the latter as of controlling importance and the outweighing factor on the question of the intent of the testatrix.

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"So with cases of wills where the testator fails to state what should be the legal consequences of the instrument, in certain contingencies, a court of construction may place itself in his position and read as a portion of the will what the language requires. The court then merely attributes to the testator the effect which, placing itself in his position when he made the will, it can see he must have intended," says Surrogate Fowler in *Matter of Lummis, supra*. In the instant case, placing the court in the testatrix's position, with the rules of law to guide, as the court understands and applies them, I decide that the general legacies in the will are not a charge upon the real estate left by the decedent. This intent I attribute to Charity C. Mould. This I think should be the true solution of the difficulty in the light of reason, precedent, equity and humanity.

Decreed accordingly.

In the Matter of the Transfer Tax upon the Estate of EVA S. COCHRANE, Deceased.

(Surrogate's Court, Westchester County, November, 1921.)

Transfer tax — strict construction of statute — where a tentative trust is not revoked upon donor's death a presumption arises that an absolute trust was created and the life estate created thereby is not subject to a transfer tax — Laws of 1905, chap. 368, § 220, subd. 3.

The transfer tax is the tax on the privilege granted by the state to an individual to succeed to the property of a deceased person; and a statute imposing such a tax must be strictly construed against the state and upon it lies the burden of proving the tax.

By a trust deed expressly reserving to the grantor at her will and pleasure, by will or other written instrument signed

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by her and delivered to the other party to the trust deed, full power to revoke it and all the trusts, powers and rights thereby created, a tentative trust is created, but upon the donor's death without having revoked the trust deed, the presumption arises that an absolute trust was created.

Such a deed constitutes a transfer of a life estate in property provided for in the deed, and in the absence of extrinsic evidence showing that the deed was intended to take effect after the donor's death, it must be held that, within the meaning of the statute (Laws of 1905, chap. 368, § 220, subd. 3) in force at the death of the donor, the deed was intended to and in fact did take effect in possession and enjoyment at its date and the life estate created thereby is not subject to a transfer tax.

Matter of Miller, 109 Misc. Rep. 267, not followed.

APPEAL from a *pro forma* order assessing a tax.

Maitland F. Griggs, for executors, appellants.

Francis A. Winslow, for state tax commission.

SLATER, S. This is an appeal from a *pro forma* order dated May 16, 1921, assessing a tax, based on the supplemental report of the appraiser. The order appealed from deals with the transfers affected by six trust deeds created in the years 1902 and 1903 by the decedent for the benefit of five friends. *First.* Two trusts of $25,000 each, created for the benefit of Augustine Haughton, wife of Reverend James Haughton, by two deeds dated October 10, 1902. *Second.* The trust of $25,000 created for the benefit of Maria Haughton Spaeth by deed dated October 10, 1902. *Third.* The trust of $25,000 created for the benefit of Mary Bowne Kellinger, by deed dated October 10, 1902. *Fourth.* The trust of $28,000 created for the benefit of Martha Punchard Baldwin, by deed dated October 15, 1902. *Fifth.* The trust of $65,000 created for the benefit of Mrs. Sarah E. Baldwin, the widow

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of Ebenezer Baldwin, deceased, the uncle of the donor, by deed dated May 21, 1903. *Sixth.* The trust of $20,000 created for the benefit of Elizabeth Paddock Getty, by deed dated May 21, 1903.

In the several deeds of trust, certain named securities made up the capital of the fund. Six years elapsed between the date of the deeds and when the decedent died on February 3, 1909. It was not asserted that the donor was in ill health in 1903. All of the beneficiaries are alive, except Augustine Haughton, who died June 17, 1920.

In the case of the trust deed for the benefit of Elizabeth P. Getty, it directed the trustee upon the death of the life beneficiary to pay over the corpus of the trust to the children of the life beneficiary, and in case there should be no such child, then to pay over to the sisters of the said life beneficiary, and, if no sisters shall survive, then to pay over the corpus to the next of kin of the said life beneficiary. In the case of the other deeds, with the exception of the one creating the trust for Martha P. Baldwin, the trustees are directed upon the death of the life beneficiary to pay the corpus to "the party of the first part," the decedent herein, or "if she be not then living, to her executors or administrators." In the deed for the benefit of Martha P. Baldwin, upon the death of the life beneficiary, the direction is to pay the corpus to the "party of the first part, if she then be living, or, if dead, to such person as the said party of the first part shall designate by her instrument in writing, or by her last will and testament, or in default of said designation to the residuary legatees mentioned in her will, or if she died intestate, to her next of kin." In each of the deeds, there is a right reserved that "no sale of said bonds, or any of them, or of any securities in which the capital of the said trust fund shall be at any time

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invested, or reinvestment of the trust funds shall be made during the lifetime of the party of the first part without her written consent, provided she shall be competent to give the same," and in each of the deeds, there are identical clauses of revocation in these words: "The party of the first part expressly reserves to herself, full power to revoke this instrument and all the trusts, powers and rights hereby created and herein set forth, at her will and pleasure and at any time by will, or by instrument in writing signed by her and delivered to the party of the second part."

The fundamental question presented is whether the voluntary settlement of the life estates made by the trust deeds should be considered as transfers which did not become absolute until the death of the testator, because they reserved the power to terminate the trust. No question arises as to the remainders, except as to the Getty trust. It is conceded that all other remainders are taxable. It is claimed by the state that the reserved power of revocation in each of the several deeds shows an intention not to make completed and irrevocable gifts *inter vivos* and, therefore, they are taxable under the Transfer Tax Law.

A tax is imposed by force of chapter 368 of the Laws of 1905 relating to taxable transfers in operation at the date of death of decedent in these words: Section 220, "A tax shall be and is hereby imposed upon the *transfer* of * * * *property*, * * * or of *any interest therein*, or *income therefrom*, in *trust or* otherwise, to persons * * * in the following cases * * *." Subdivision 3. "When the transfer is of property made by * * * by deed, grant, bargain, sale or gift * * * *intended to take effect in possession or enjoyment* at or after such death."

Section 242 defines "property" as used in the Tax

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Law to mean the property, or interest passing, or transferred to donees, and not as the property, or interest of * * * the donor. The word "transfer * * * shall be taken to include the passing of property or any interest therein in the possession or enjoyment, present or future, by * * * grant, deed, bargain, sale or gift * * *."

The state contends that these deeds are gifts to take *effect at death.* It is true that gifts *inter vivos* must contain the element of finality. The gift must operate immediately, and irrevocably. *Ridden* v. *Thrall,* 125 N. Y. 572. But, the law speaks of transfers of property not alone by gift, but by deed, grant, bargain, sale. It is not in express terms limited in its effect to any particular kind of gifts, but is unrestricted. These voluntary settlements, or contracts created by deed, without valuable consideration passing, may well be, and are tentative trusts, so that the passing or transfer of the beneficial interest and enjoyment need not be claimed as a gift *inter vivos* and subject to all its essential elements. The gifts were of such a character as to immediately pass the title to the property to the trustee and the enjoyment to the donees. The gift was unconditional in their possession and not subject to control or domination of the donor. The case fails to disclose facts sufficient to found a conclusion upon, that they were made in bad faith, or with the intent of evading the transfer tax. However these instruments, or settlements, may be classed, they fall within the kind of transfers mentioned in, and are within, the meaning and intent of the act, which, if intended to take effect in possession or enjoyment before death, are not taxable.

Of the several cases decided by the Court of Appeals involving questions of reserved powers, none appear

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to pass directly upon the question in the instant case. At the outset we are met with the claim of opposing counsel that all the cases in the Court of Appeals upon the subject sustain their position. The real difficulty, however, is in navigating between the sure channels of the law as laid down and the shoals of dictum.

The transfer tax is a tax on the privilege granted by the state to an individual to succeed to the property of a deceased person. *Matter of White,* 208 N. Y. 64; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283.

The law imposing the tax must be strictly construed against the government and favorable to the taxpayer. *Matter of Vassar,* 127 N. Y. 1, 12; *Matter of Bronson,* 150 id. 1. If a doubt exists whether a tax is to be levied, or not, it should be resolved against the state. *Matter of Wiemann,* 179 N. Y. Supp. 190. The state has the burden of proving the tax. *Matter of Miller,* 77 App. Div. 473. Having in mind these principles, let us proceed.

Matter of Masury, 28 App. Div. 580; affd., without opinion, 159 N. Y. 532, is claimed to help the contention of each party to this contest. In one of the trust deeds therein the donor *reserved the avails during his lifetime* and the court held that it did not vest the beneficiary with any right of property until the death of the donor, and that it fell within the provisions of the taxable transfer law. As to the other deeds of trust, the court concluded that they were not liable to taxation because the *donor had divested* himself of all title upon their execution in so far as the *beneficial* use of the same was involved and vesting the funds at the date thereof, in no wise contingent upon the death of the grantor, in the beneficiary. It seems that another reason for deciding these latter trust deeds to be non-taxable was the fact that the corpus of the

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trust was to vest in the beneficiary on a certain fixed date. In *Matter of Bostwick,* 160 N. Y. 489, the court, with reference to the *Masury* case, said that "* * * we may have gone too far in generally affirming the *Masury* decision;" and further said: "* * * certainly the limit was then reached, beyond which the courts could not go without emasculating the provisions of the statute. We thought there was some reason in the facts of the *Masury* case for finding an intention in the donor to make an absolute transfer of property during his life, which the mere reservation of a power to revoke was, of itself, insufficient to negative." Therefore, the *Masury* decision may be said to be law for its own particular facts. However, Mr. Justice Woodward, in writing the opinion in the *Masury* case in the Appellate Division, used some language indicating the belief of the justice and the court that when a trust deed vested the immediate use of the income of a fund in the beneficiary, the fund is not taxable as a transfer intended to take effect at the death of the grantor. In his opinion, at page 583, upon this point, he said: "* * * we are asked to determine that, because of the fact that the grantor might have revoked the trusts at any time during his lifetime, the rights of the appellants in the trust funds did not become absolute until after the death of the grantor, and that, therefore, the property passed into the possession of the appellants, or their rights became absolute upon the death of the grantor, and it is subject to the tax * * *." "This," the court says, "does not, however, follow. If it should be determined that the gift did not become absolute until the possibility of its annulment ceased, upon the death of the grantor, it would still be necessary to show that the *gift was 'intended to take effect, in possession or enjoyment, at or after such death;' and to determine the*

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intention of the donor, we must look, not to the argument of the respondent, but to the language of the deeds of trust, the relations which existed between the parties, and the fact of the beneficial enjoyment of the avails of the trust."

The trust deeds in the *Masury* case each reserved the right to revoke and annul the same during the lifetime of the maker. No other right was reserved. Referring to this right, at page 585, the court said: "There is nothing to indicate that the grantor had any intention of making use of this right except to protect the beneficiary should such action become necessary during his lifetime; and the fact that he did not make use of it up to the time of his death precludes the presumption that he would have done so at any time. At least, the presumption cannot be raised to show an intention directly contrary * * *." The *Masury* opinion by Mr. Justice Woodward was adopted as its own by the Court of Appeals.

Surrogate Crosby of Chautauqua county, in *Matter of Patterson,* 127 N. Y. Supp. 284, speaking of the *Masury* decision and its legal effect, says: "All that the court in the Masury Case decided was that the reservation of the power of revocation at any time during life did not mark the transfer as one intended to take effect at death. The court was clearly right."

In *Matter of Bostwick, supra,* the facts were these: The donor had made deeds of trust, in some reserving the payment of the income to himself, or to such other persons as he might designate; the power to *alter,* or *amend* the trust; to withdraw, or to exchange any securities; and to control the acts of the trustee in disposing of the securities, and the right to terminate the same at any time. They are more extensive reserved powers and are entirely different from the right reserved in the instant case. The court held

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that all these reserved powers indicated an intention on the donor's part to retain a dominion over the properties transferred, and did not consider that the donor intended to vest the absolute right to present enjoyment in the beneficiaries. He retained practical control of the trust property and left the question of its beneficial enjoyment and eventual possession open until his death. The court in this case referred to the *Masury* case, and said: "The powers reserved in those deeds to revoke, or to annul, the trust during the donor's lifetime were considered, of themselves, not *to affect the present vesting of the property, or to make its beneficial enjoyment contingent upon the death of the donor* * * *. The reserved power to revoke would enable him, of course, to put an end to the trust; but that was not enough to effect the possession of the trustee, or the beneficial enjoyment of the object of the donor's bounty, while the trust was in force, and such a power carried with it no control over the property, or its management." The court further said: "In the present case, however, (Bostwick) the donor has reserved, during his life, such numerous and extensive powers * * * as to preclude the legitimate inference of an intention on his part that they were to take effect in absolute possession or enjoyment before his death."

Matter of Bowers, 195 App. Div. 548; affd., 231 N. Y. 613, without opinion, is the recent case upon the subject. There the donor in certain deeds of trust had made two reservations. *First,* the right to approve of the reinvestments of stock; *second,* the power to *alter, or amend,* or extend all, or any of the terms of the instrument with the *consent* of either one of the parties of the second part. Mr. Justice Page, writing for the Appellate Division, said as to the first reservation, which is similar to one of the reservations in

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the instant case, that there is nothing in this clause to qualify or cut down the absolute character of the gift, and that the provision is not for the benefit of the grantor, but insures the preservation of the fund in the interest of the beneficiary of the trust. As to the other reservation, the court, while doubtful, was willing to assume that the right to "alter, amend or extend" permitted the donor to revoke the deed, and said that "* * * he (the donor) did not exercise that right in his lifetime, and as was said in *Matter of Masury* (28 App. Div. 584; affd., 159 N. Y. 532): 'If we are to get at the intention of the grantor from the language used in raising the trust, then there can be no doubt that John W. Masury intended this deed of trust to become of full effect whether he lived or died, and the detail with which he provided for the disposal of the property in the event of the death of his grandson precludes the idea that he had any other motive in retaining the right to annul the deed than a prudent caution would suggest. It had no bearing upon the intention. * * * There is nothing to indicate that the grantor had any intention of making use of this right except to protect the beneficiary should such action become necessary during his lifetime; and the fact that he did not make use of it up to the time of his death precludes the presumption that he would have done so at any time. At least the presumption cannot be raised to show an intention directly contrary to that expressed in the deed of trust.'"

Judge O'Brien, in *Matter of Green*, 153 N. Y. 223, 227, in holding that the remainders transferred were intended to take effect at or after the death of the donor, said: "Until her death, (meaning the donor) they (meaning the nieces) had no actual possession, or right to the possession, of the property. Since they could not receive any part of the principal or *of the*

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income till after her death, their right of enjoyment was postponed till the happening of that event. Whatever interest they may have had before, the right to the possession and enjoyment depended upon the death of the donor." This language clearly implies that the court had in mind and gave particular consideration to the possession of the property and the enjoyment of the income thereof.

Each case must be determined by its own peculiar facts. The aim of the law is to reach property, where by reasonable deduction the donor intended to retain its enjoyment.

The important words in the taxable transfer law are the words "*intended to take effect in possession, or enjoyment.*" What did the donor intend as to the possession or the enjoyment of the avails of the gift in the instant case? Did he *intend* the gifts to take effect in possession or enjoyment at or after death? Did the donees have such possession or enjoyment from the creation of the trusts? Possession of the securities passed to the trustee, it had the legal title, managed and controlled the property, and the enjoyment, which means the use, passed to the beneficiaries. They have had the yield of the securities since the creation of the trusts. The deeds were unrevoked at the time of the donor's death. Neither did the will of the donor revoke them.

The courts have decided what constitutes "possession or enjoyment" by holding that the retention by the grantor of the *income* of a trust fund is so distinctly a characteristic of possession and enjoyment of an estate as to constitute convincing *evidence of an intent,* that the deed shall not "take effect in enjoyment" until the grantor's death. Consequently, the avails of a trust fund in a donee, without reserving numerous or extensive powers or con-

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trol in the donor constitute enjoyment and is presumptive evidence of the intent of the donor. Under our deeds of trust the possession and avails passed to the donee. One of the tests to be applied to ascertain the donor's intention is, who gets the possession or enjoyment of the funds? *Matter of Green,* 153 N. Y. 223; *Matter of Masury, supra,* as to one deed of trust; *Matter of Dana Co.,* 215 N. Y. 461; 214 id. 710.

It is significant, that in every reported case in the Court of Appeals where the gift was taxed, the enjoyment of the income was retained by the donor.

The right to these life interests took place when the deeds were executed and delivered, not at death, because the donor had parted with a life estate in the funds; both possession and enjoyment passed; he retained no control; no further beneficial interest passed to the beneficiaries at the death of the donor. Nothing was expectant. The right was vested in possession and enjoyment. Complete possession and enjoyment was intended, and it existed. No greater beneficial enjoyment was had after Mrs. Cochrane died. Her death only made the enjoyment absolute. The donor did not reserve an estate of a beneficial character. Within the meaning of the Tax Law, the intent of the donor shall be ascertained by what he does with the possession or enjoyment of the funds of the trust. The law assumes to tax a life estate given at death. Such an estate is the right to enjoy property for the life of the donee, or of some other named person. If the enjoyment of it commences at the death of the donor, it is taxable. If, however, it is received, possessed and enjoyed before the donor's death, and not given in contemplation of death, it is not taxable.

The donor created a tentative trust, revocable,

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under its terms, and upon the donor's death, without revocation, the presumption arises that an absolute trust was created. *Matter of Totten,* 179 N. Y. 112. It was an estate "vested in possession" as distinguished from one "vested in interest." An estate is vested in possession when there exists a right of present enjoyment. *Butler* v. *Sherwood,* 114 Misc. Rep. 483; *Matter of U. S. Trust Co.,* 117 App. Div. 178.

This exact question was involved, and considered in *Matter of Miller,* 109 Misc. Rep. 267. In that case the donor reserved only the right to *revoke the trust,* and Surrogate Cohalan decided that the trust deed fell within the terms of the taxable transfer act and was taxable, basing his conclusions upon the decision in *Matter of Bostwick, supra,* and *Matter of Dana Co.,* 215 N. Y. 461. I am unable to agree with the learned surrogate of New York county.

The power to *amend or alter* and control as reserved in the *Bostwick* case withholds the right to re-create, re-establish, and retain those extensive and numerous powers, which the *Bostwick* decision said were inconsistent with possession or enjoyment in the donee. These powers clothe the donor with the right to make practically a new deed of trust, with unlimited reserved power, including the enjoyment of the income. The power to revoke goes to the destruction of the trust only, the re-vesting of the property in the donor. It is a right to resume the ownership. No new or added powers of control can be created for, or enjoyed by the donor. Either the trust continues to be possessed and enjoyed by the donee, or it returns to the ownership of the donor. Until the power to revoke is exercised, the gift is complete in possession and enjoyment. The donees enjoy all the substance of the trust. The donor has

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completely parted with the control over and with his property. The beneficial interest in a trust is personal property and remains a right to enforce the performance of the trust in equity, contingent upon nothing, except the terms imposed by the declaration of trust.

The power of revocation in the instant case does not bring these trust deeds within the rule laid down in *Matter of Bostwick, supra; Matter of Ely,* 149 N. Y. Supp. 90; *Matter of Schermerhorn,* Id. 95; *Matter of Hoyt,* 86 Misc. Rep. 696; *Matter of Brandreth,* 169 N. Y. 437; *Matter of Cornell,* 170 id. 423.

With Surrogate Fowler's dictum in *Matter of Garcia,* 101 Misc. Rep. 387, that "It seems to be established by the decisions of the courts of this state that if a donor reserves to himself the power to revoke the deed of trust, the transfer of the property constituting the *corpus* of the trust fund does not take place until his death." I do not concur for the reasons indicated herein. As against this dictum we have the opinion of Surrogate Thomas of the same court made in *Matter of La Farge,* N. Y. L. J. Nov. 17, 1908; he says: "The mere reservation of a power to revoke the conveyance was of itself not sufficient evidence to support a finding of an intent in the donor not to make an absolute transfer (*Matter of Bostwick,* 160 N. Y. 489, 494), and that is the only evidence relied upon by the State Comptroller."

I view the power of revocation as only a way to annihilate and put an end to the possession and enjoyment of the life estates. A way to effect a change of purpose and undo what has been done. One of two things must always be true under a lone power to revoke. The trust is destroyed and consequently the life estate and its enjoyment, or else the

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life estates still exist, with possession and enjoyment in the donees. The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence, or effect of that which may perhaps be hereafter brought to an end, for the simple reason that the enjoyment and possession actually passed to the beneficiaries. A power to revoke may make the continuance of the estate precarious during the lifetime of the donor, but nevertheless until the right is exercised, an estate exists by virtue of the transfer and in this case was so intended. Being such, it falls without the statute.

We are well within the decisions of the *Masury* and *Bowers* cases, and within that part of the closing words of the *Bostwick* case: "If a person intends, in good faith, to make an absolute gift of his property during his life to others * * * *which shall not be contingent as to its possession or enjoyment upon the event of his death,* there is no inhibition in the act in that respect." If this decision will permit trusts to be created without the taxing power of the Transfer Tax Law, the remedy lies with the legislature and not with the courts.

These deeds of trust constitute transfers of life estates in the property, except the right to revoke is reserved. No extrinsic evidence has been adduced to show that any of the deeds of trust was intended to take effect after the decedent's death. Therefore, any such intent must be found in the instruments.

I fail to find an intention upon the part of the donor to delay possession, or enjoyment, at or after her death. As a matter of law, I find that the donor had no such intention. Guided by the decisions as I interpret them, I understand the effect of the deeds of trust to be such that under the meaning of the Transfer Tax Act, they were intended to take effect

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and did in fact take effect in possession and enjoyment at their several dates.

There being no intention on the donor's part to retain dominion over the property transferred, for the life of the beneficiaries, I conclude that the trust deeds are not liable to taxation under the Transfer Tax Act, such trust deeds having divested the grantor of all title so long as the power of revocation was not exercised, and becoming operative immediately upon their execution in so far as the beneficial use of the same was involved and vesting the funds in no wise contingent upon the death of the donor, in the beneficiaries.

The *pro forma* order assessing the tax upon the life estates created by said deeds of trust is reversed.

Order reversed.

BANNER MILLING COMPANY, Claimant, *v.* STATE OF NEW YORK.

Claim No. 15474.

(Court of Claims, November, 1921.)

Eminent domain — adverse possession — canals — Laws of 1848, chap. 213 — canal property held by state as sovereign cannot be lost by adverse user — constitutional law — State Const. art. 7, § 8 — compensation for established business — "property" does not include good will — Laws of 1911, chap. 746 — damages for appropriation of structures — claims against state — Laws of 1918, chap. 606 — jurisdiction of Court of Claims — Code Civ. Pro. § 264 — no costs in Court of Claims — Code Civ. Pro. § 274.

Claimant, a domestic corporation, for many years previous to 1917, was the owner of a parcel of land in the city of Buffalo, having a frontage on a street of over 200 feet and extending back to the "blue line" defining the "Ohio Basin," state property, which ever since its construction has been used for the

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accommodation of the boats and commerce of the Erie canal, with which it had water connection. Since 1887, claimant had conducted a very successful business in the manufacture of flour and during the last ten years of its operation the annual profits had averaged more than $50,000. Although the northerly portion of claimant's property, sixty-six feet in width, was unoccupied by buildings, its plant comprising various structures was fully equipped for operation. Pursuant to statute (Laws of 1911, chap. 746, as amended) the state on April 7, 1917, without notice of intention, made a permanent appropriation of the property of claimant, serving a notice thereof upon it, and also a map describing the property to be taken by metes and bounds, which defined the distance from the east line of the street to the "blue line" on the westerly side of the "Ohio Basin" as eighty-five feet, which the state contended was the depth of the property of claimant, as against its contention that said "blue line" is distant ninety-one and four-tenths feet from the street. On the strip in dispute, to which claimant has no record title, and more than eighty-five feet from the street stood claimant's dock, canopy and elevator leg and a portion of the elevator building, of the boiler building, of the storehouse and of the barn. *Held,* that the "Ohio Basin" having been by the statute (Laws of 1848, chap. 213) authorizing its construction, made a part of the Erie canal system, and its alienation prohibited by article VII, section 8 of the Constitution of the state, said strip of land in dispute, which is a part of the "Ohio Basin," was held by the state as sovereign, not as proprietor, and could not be lost to the state by claimant's adverse user, and claimant cannot recover for the appropriation thereof by the state.

People v. *Baldwin,* 197 App. Div. 285, followed.

The state having allowed the structures erected by claimant on said strip of land to remain unmolested for more than thirty-five years without claimant being required or notified to remove them, was liable in damages for its actual appropriation of said structures.

After said appropriation by the state claimant continued to operate its mill until June 13, 1917, in order to consume the stock of grain in the elevator, and thereafter until December, 1917, when it ceased business, occupied the mill as a warehouse, buying flour and shipping it out under its own order until it could no longer secure flour owing to war conditions. *Held,* that considering together as items of damage the "going value"

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and "good will," which confessedly in legal contemplation included the "going value" of claimant's plant and business, which it was contended the state had destroyed by its appropriation, claimant had failed to establish that said appropriation had either destroyed or impaired the good will of claimant's business, although the proof disclosed that there was difficulty in finding a site in Buffalo which satisfied claimant and in completing the equipment of a plant there, during the period between the appropriation and the time when claimant was obliged to vacate the property, and that the conditions subsequent to the appropriation were such that the creation of a new plant and equipment was impossible or prohibitively expensive.

The word "property" as used in the Constitution and in condemnation statutes generally does not include good will and should not be construed to include it under chapter 746 of the Laws of 1911 and chapter 606 of the Laws of 1918.

The fact that on December 1, 1917, the canal board by resolution authorized the state engineer and surveyor to take such steps as he might deem necessary for the protection of the property, either by insurance or watchman, and who availed the state of the insurance then in force, upon which claimant had paid the premium, established no liability on the part of the state for like expenditures made by claimant up to December 4, 1917.

The liability of the state for like expenditures after December 4, 1917, if any, is an express contract submitted by law to another officer for audit or determination, a claim for which, under section 264 of the Code of Civil Procedure, this court is without jurisdiction to hear and determine, unless the claim has been rejected by the proper tribunal or officer.

Award made to claimant with specification of items, aggregating a total award of $235,000, with interest from the date of the appropriation, but by virtue of section 274 of the Code of Civil Procedure, without costs and disbursements.

CLAIM against the state for lands appropriated.

Henry W. Hill (Alfred W. Gray, of counsel), for claimant.

William E. Thorpe and George Sleicher, deputy attorneys-general, for state.

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CUNNINGHAM, J. On April 7, 1917, and for many years previously, the claimant, a domestic business corporation, was the owner of a parcel of land in the city of Buffalo, lying between Ohio street and property of the state known as the Ohio Basin. The premises had a frontage on Ohio street of 234.4 feet and extended back to the "blue line" defining the Ohio Basin. The latter was, and ever since its construction had been, used for the accommodation of the boats and commerce of the Erie canal with which it had water connection. On this site since 1887, claimant had conducted a very successful flour manufacturing business, its profits during the last ten years of its operations averaging more than $50,000 annually. The northerly portion of the property, in width sixty-six feet, was unoccupied by buildings. The structures comprising the claimant's plant consisted of (1) a five story brick mill, eighty-two feet by fifty-four feet, having a total capacity of 800 barrels of flour per day; (2) a grain elevator, with a marine leg extending over the dock along the Ohio Basin, used in the elevation and storage of grain from boats, being thirty-six and one-half feet by forty-two feet and higher than the mill, its walls to the second story being of brick and above that point of laminated plank construction; (3) an engine and boiler room of brick one story high; (4) a two story brick warehouse, fifty-four and one-half feet on Ohio street by ninety-one feet deep; (5) a frame barn with a frontage of about thirty feet on Ohio street; (6) a brick smoke stack; (7) a timber dock extending from the rear of the buildings to the water of the Ohio Basin and over which dock was a canopy roof. The plant was fully equipped with machinery and apparatus for its operation.

On April 7, 1917, pursuant to chapter 746 of the

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Laws of 1911, as amended, the state made a permanent appropriation of property of the claimant and served upon it a map and a notice of the appropriation. An inscription on the map described the property by metes and bounds. The course and distance of the boundary line measuring the greatest depth of the property from the east line of Ohio street was given in the description thus: "Thence along said division line north 71 degrees 03 minutes E, 85.0 feet to the Blue Line on the westerly side of Ohio Basin."

After the description was this paragraph: "This appropriation covers merely lands, buildings and other structures. All fixtures, machinery or appurtenances which may be deemed as fairly removable remain the property of the owner and are subject to his disposition."

The claimant demands damages in the total sum of $653,850 by reason of this appropriation. The items of the claim are as follows:

(1) For the lands, structures and other tangible and intangible property appropriated, comprising one integral whole, $350,000, with interest from April 7, 1917.

(2) For the claimant's going milling business taken, interrupted and destroyed by the appropriation, $300,000, with interest from April 7, 1917.

(3) For expense of watchman, insurance and other protection of the property after the appropriation and prior to December 4, 1917, $1,350.

(4) Expense of obtaining title searches, maps, printing charges and other expenses imposed upon the claimant by reason of the appropriation, $2,500.

This proceeding is important not only because of the very substantial sum involved, but also because of some interesting and somewhat unusual inquiries

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incident to it. They may be outlined briefly, as follows:

(1) It will be noted that the above-quoted description defines the distance from the east line of Ohio street to the "blue line" on the westerly side of Ohio Basin as eighty-five feet, which the state contends was the depth of claimant's property. The claimant contends that its premises extended a depth of ninety-one and four-tenths feet from Ohio street,— that is, that the "blue line" is distant ninety-one and four-tenths feet from Ohio street. Thus the title to a strip of land at the rear of claimant's premises is in dispute. On the land in controversy and more than eighty-five feet from Ohio street stood claimant's dock, canopy, and elevator leg, and a portion of the elevator building, of the boiler building, of the storehouse and of the barn. The claimant contends it has record title to this strip, and if it has not, then title by adverse possession, and if neither, then that it is entitled to recover the value of the structures on the disputed area, because they, at least, are its property and have been appropriated.

(2) The claimant argues that it is entitled to recover as a separate item of damages the "going value" of its plant and business.

(3) It claims that the "good will" of its business has been taken and destroyed by the appropriation and that this is compensational as a separate item of damages.

(4) The claimant contends that the appropriation does not define the machinery and fixtures appropriated and that all, therefore, have been appropriated and must be paid for, and if this is not correct, then that substantially all the machinery should be classed as not "fairly removable" and must be paid for. We will discuss these matters consecutively.

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We find that the state is correct in its contention concerning the location of the "blue line." This is a matter of fact and it is needless to discuss it here. The record evidence and the testimony of the state's engineer, Mr. Speyer, establish the "blue line" at a distance of eighty-five feet from Ohio street. It follows that the claimant has no record title to the strip in question on which an important and valuable part of its plant stood. The claimant, however, argues strenuously that it has title by adverse possession to this strip. The facts are not in dispute. The claimant's plant, dock and structures were erected in 1882, and continuously stood in the same location to the date of the appropriation. Previous to their erection, other structures of its predecessors in title intruded upon this strip substantially to the same distance. And this was so continuously, from a date more remote than the year 1877 to the time of the construction of the claimant's plant. From these facts, the claimant contends that it has title to the debated strip by adverse possession. In support of that claim it relies on section 362 of the Code of Civil Procedure, which reads:

"Sec. 362. *When the people will not sue.*

"The people of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either,

"1. The cause of action accrued within forty years before the action is commenced; or,

"2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time."

The state answers that title cannot be acquired from the state under these circumstances by adverse

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possession. This question was recently before the Appellate Division, third department, in the case of *People* v. *Baldwin*, 197 App. Div. 285. The lands involved were situated within the Forest Preserve, as defined by statute. The court said (p. 288): "We are of the opinion that the vital question in this case is this: Was the land, the title of which is in question here, owned and held by the State as a sovereign in trust for the People, or as a proprietor only? There is a well-recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only, for the purpose of 'sale or other disposition.' (*Weber* v. *State Harbor Comrs., supra,* 18 Wall. 68.) In either circumstance, except a statute (making an agreement on behalf of the People not to sue) authorizes it, lands of a sovereign State cannot be lost to, or taken from, the State by failure to assert her title (2 C. J. 213; *Fulton L., H. & P. Co.* v. *State,* 200 N. Y. 400, 420; *St. Vincent F. O. Asylum* v. *City of Troy,* 76 id. 108; *Hays* v. *U. S.,* 175 U. S. 248, 260); and, after such a statute has been passed by a State, such lands only as the State holds as a proprietor may be lost to the State; it cannot lose such lands as it holds for the public, in trust for a public purpose, as highways, public streams, canals, public fair grounds. (*Burbank* v. *Fay,* 65 N. Y. 57; 2 C. J. 213, 214, 215.)"

The court proceeded to point out further that the land involved, being part of the Forest Preserve, could not be acquired from the state by adverse possession, because of the statute and of the Constitution (Art. VII, § 7), which provides that it cannot be "leased, sold or exchanged, or be taken by any corporation, public or private, * * *." The court quoted with approval from *People ex rel. Turner* v. *Kelsey,* 180 N. Y. 24, 26, as follows: "We have referred to

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the provisions of the Constitution for the purpose of showing that these lands are forever reserved for the Forest Preserve and that no power exists on the part *of the legislature or of any officer or department of the state to dispose of, or in any manner deprive the People of their title to the lands.*" (The italics are ours.)

It is obvious that the strip of land with which we are concerned was held by the state as sovereign in trust for the people and not as proprietor. It was a part of the Ohio basin, whose acquisition, development and maintenance by the state were for the commercial advancement and prosperity of the state and of its people. Therefore, it could not be lost to the state by any adverse user. But, in addition, the Ohio basin lands, by statute, were made part of the Erie canal system, and as such are inalienable. The Canal Law (Laws of 1909, chap. 13; Laws of 1894, former chap. 338), section 2, provides: "the term 'canal' as used in this chapter, includes all the sidecuts, feeders *and other works belonging to the State* connected therewith." The Ohio basin was physically connected with the Erie canal, and existed for the convenience and development of its commerce. It was constructed under the authority of chapter 213 of the Laws of 1848, which indicated its purpose and status. As a part of the Erie canal its alienation was prohibited by the State Constitution, article VII, section 8, which provides: "The legislature shall not sell, lease or otherwise dispose of the Erie canal * * * but they shall remain the property of the State and under its management forever." It is patent, therefore, that the case of *People* v. *Baldwin, supra*, is decisive here. That case is in accord with an earlier one in the Court of Appeals. *Burbank* v. *Fay*, 65 N. Y. 57.

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Various cases cited by the claimant are inapplicable. Counsel place great reliance on the discussion of this question by Judge Gray in *Fulton Light, Heat & Power Co.* v. *State of New York,* 200 N. Y. 400, 421. Evidently they have overlooked the fact that it was wholly *obiter,* and that the learned judge stood alone in his ratiocination. Judges Cullen and Willard Bartlett dissented and Judges Werner, Chase and Hiscock expressly refrained from any opinion on the question. Furthermore, the discussion of authorities by Judge Gray made clear the distinction between the acquisition by prescription of an *easement,* and acquisition of *title* by adverse possession, against the state. *Matter of Commissioners of State Reservation,* 37 Hun, 537, 548, is readily distinguished from the case before us, in that the court assumed that the state could make an express grant of the *easement* involved, and it appeared clearly that the title held by the state was as proprietor simply.

From the foregoing discussion it is clear that the claimant had no title to the strip of land in question either of record or by adverse possession, and cannot recover for its appropriation. The *structures* on the strip of land, however, had a different status. They had been allowed to remain unmolested by the state for more than thirty-five years, as had been the buildings on the same location for many years before. The claimant was never required or notified to remove them. A similar situation arose in the case of *Watson* v. *Empire Engineering Corporation,* 77 Misc. Rep. 543. A motion was made before Judge Pound at Trial Term to dismiss the complaint, which raised the question. The court said: "As others have done, he built within the 'blue line.' His mill was allowed to remain, unmolested by the state, for so many years that it is presumed that the state acquiesced therein.

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He thus is to be regarded as a licensee, rather than as a trespasser. As such, his rights could be terminated without compensation only by giving him a reasonable notice to withdraw and remove his property from the premises. 25 Cyc. 650. * * *

"The state doubtless had the right at any time to terminate plaintiff's license and to require him to remove his building from the canal lands. After due notice to remove, the building would become an encroachment which the state might remove, but it could not, without compensation and without warning, deprive the plaintiff of valuable property which it had allowed to be erected on its lands and used there for many years."

Here the state, through its contractor, ousted the claimant from possession of all its plant, part of the latter on the strip mentioned was destroyed and removed and over all of it the state assumed dominion and control. There can be no doubt that whether or not there was a statutory appropriation of the structures on the disputed strip, there was an actual appropriation of them which renders the state liable in damages in this proceeding. *Watson* v. *Empire Engineering Company, supra; Oswego & Syracuse R. R. Company* v. *State of New York,* 226 N. Y. 351. Therefore, our award will include compensation for the structures on the controverted area.

It is convenient to discuss "going value" and "good will" as alleged items of damage together. Without notice of its intention the state made the appropriation on April 7, 1917. Thereafter the claimant continued to operate the mill to consume the stock of grain in the elevator, until June 13, 1917, and thereafter, until December, 1917, it occupied the mill as a warehouse, buying flour and shipping it out under its own brand. It continued the latter process until

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it could no longer secure flour, owing to conditions concomitant to the war. The contention was made and supported by some testimony at the trial, that no other site in the city of Buffalo was as convenient and available for the claimant's business as the property appropriated. After the appropriation the claimant caused some inquiries to be made by real estate brokers, but failed to find a site wholly satisfactory to it and purchased none. In December, 1917, claimant ceased business and did not resume afterward. There is some testimony that conditions were such, subsequent to the appropriation, that the creation of a new plant and equipment was impossible, or prohibitively expensive. There is evidence, also, that the good will of the flour business has peculiar qualities. If the output is interrupted and the habit of use of a particular brand lost, resumption is difficult and expensive to attain, if not utterly impossible. The good will of the Banner Milling Company's business was worth between $250,000 and $350,000, and after being interrupted for one year was worth between $25,000 and $75,000 only. Mr. Shuttleworth, the president of the company, testified that it was worth $250,000 to $350,000, and that he arrived at this sum by capitalizing the average annual profits, less interest on the investment, over a period of ten years. The claimant contends that the going value and good will of its plant and business were destroyed by the state by the appropriation, and that it is entitled to recover the value of these items, separately and distinctly from the value of the physical property taken. The claimant defines these items of its claim thus: "The going value has ordinarily been conceived to include all those elements of value or cost which enter into the construction of a plant and the synchronizing of it, so that it will operate satisfactorily, which items

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are not included under tangible value, viz: such items as overhead expense during construction, accidents occurring in construction not covered by insurance, or the cost of insurance against accident, fire insurance, taxes and interest on investment, engineering and supervision expenses, cost of maintenance and losses in the operation of the plant, until such time as the plant is tuned up and operated profitably. In fact all that enters into the construction and tuning up of the plant, exclusive of tangible properties.

"Good will has been construed to include the value of brands, trademarks, a reputation for good product, fair and honorable dealing, and all those elements which contribute to the ready merchandising of the product of the company."

The claimant is entitled to recover the value of its physical property as it existed at the time of the appropriation. That does not mean that its value is to be arrived at by taking the value of the various elements and items making up the property separately, and considering them without reference to each other, and then adding together these sums. The claimant is entitled to compensation, not merely for so much land, so much brick, lumber, materials and machinery considered separately, but if they have been combined, adjusted, synchronized and perfected into an efficient, functioning unit of property, then it must be paid for that unit, so combined, adjusted, synchronized and perfected, as it existed at the moment of appropriation. In that limited sense, it is entitled to the "going value," if such a term is permissible, of its physical property. In fixing the amount of award we will be guided by that principle.

But it is evident from the claimant's definitions, that it has no such limitation in mind. The going value for which it asks recovery is included, as it

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frankly confesses, in the usual legal conception of good will. So what we have to say in reference to the latter is applicable to the former.

Our attention first is directed to article I, section 6, State Constitution, providing, "* * * nor shall private property be taken for public use, without just compensation," and to the Fifth Amendment, United States Constitution. Of course the Fifth Amendment to the Federal Constitution has no application, because it is elementary that the first ten amendments to that instrument are applicable only to the federal government, are restrictions upon its action and are not limitations upon the powers of the states. U. S. Const. 10th Amendt. However, the provisions of both Constitutions are identical.

The claimant's counsel, with sedulous care, have collated numerous authorities defining good will and going value *as property* for various purposes, within the purview of certain statutes, and in divers relationships. These authorities define good will as property within the provisions of the *transfer tax statute* (*Von Bremen* v. *MacMonnies,* 200 N. Y. 41, 51; *Matter of Ball,* 161 App. Div. 79; *Slater* v. *Slater,* 175 N. Y. 143, 150; *Godley* v. *Crandall & Godley Co.,* 153 App. Div. 697, 713); also for the purpose of *other taxation laws* (*Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 218; *Parker* v. *Elmira, C. & N. R. Co.,* 165 N. Y. 274, 280; *Matter of Brooklyn,* 143 id. 596; *Monongahela Navigation Company* v. *United States,* 148 U. S. 312-345); also as a *firm asset* (*White Corbin & Co.* v. *Jones,* 79 App. Div. 373, 376). On authorities such as these, the claimant predicates its argument that going value and good will, thus judicially being included in the term property, cannot be appropriated by the state without just compensation. We note that in the array of precedents is not to be found one which defines

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good will as property, within the meaning of the constitutional provision quoted, except in the single instance where the plant or business of a *public service corporation* has been taken. It seems that some courts have said that going value, in this instance, is property. The decisions cited by the claimant, where such statements are made, are limited to this single class and are typified by *People ex rel. Kings Co. L. Co.* v. *Willcox,* 210 N. Y. 479, and *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 192. The claimant, therefore, has failed to cite any *authority* for its contention. We are not concerned here with mere theory, nor speculation concerning the policy which ought to underlie wise condemnation legislation. This matter is not novel. Text writers and courts have passed upon it many times since the constitutional provision was indited. The meaning of the term "property" is firmly established. It is well settled that in the absence of statutory provision expressly providing compensation for good will or going business taken or injured, they are not included in the term property. 2 Lewis Em. Dom. 1271, § 727 (487); 20 C. J. 779, and cases cited; 10 Am. & Eng. Ency. of Law (2d ed.), 1114, and cases cited; *Edmands* v. *City of Boston,* 108 Mass. 535; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312. The law is succinctly stated in Lewis on Eminent Domain, *supra:* "While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where

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a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates."

The legislature may prescribe a more liberal standard of compensation than that provided by the Constitution. *Matter of City of New York,* 190 N. Y. 350, 353. Express statutes have made the appropriation of or injury to good will or established business compensational in some instances. In Massachusetts, under the Metropolitan Water Supply Act, such compensation is recoverable. Acts of 1895, chap. 488, § 14; *Whiting* v. *Commonwealth,* 196 Mass. 468; *Sawyer* v. *Commonwealth,* 245 id. 190; *Gavin* v. *Commonwealth,* 182 id. 190. So too, in New York, under the statute providing for an additional water supply for New York city, damages for decrease in value of established business may be recovered. Laws of 1905, chap. 724, § 42, as amd. by Laws of 1906, chap. 314; *People ex rel. Burhans* v. *New York,* 198 N. Y. 439. The statute under which this appropriation was effected contains no such special provision. Laws of 1911, chap. 746. The claimant, however, argues that chapter 606 of the Laws of 1918 supplies that provision. Its title reads: "An act to extend the time for filing existing claims against the state for compensation or damages for or on account of the appropriation of property in connection with the construction of improved canals and canal terminals, and giving the court of claims jurisdiction."

Section 1 provides:

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"SECTION 1. The court of claims shall have jurisdiction of and may hear and determine any claim against the state heretofore accrued, which shall be filed within one year after this act takes effect, for compensation or damages for or on account of the appropriation by the state of any lands, structures, waters, franchises, or other property in connection with the improvement of the Erie, Champlain and Oswego canals, * * * for the purpose of furnishing proper terminals and facilities for barge canal traffic, * * * notwithstanding the lapse of time since the accrual of the claim; but nothing herein contained shall be deemed to shorten the time within which any such claim may be hereafter filed pursuant to any statute giving such court jurisdiction of a claim accruing within two years before the filing thereof."

It is urged that the phrase "or other property" authorizes compensation for good will. The word "property" must be given the ordinary and usual legal significance which it has in condemnation legislation. We have seen that, as used in the Constitution and in condemnation statutes generally, it does not include good will. It should be construed not to include it here. Furthermore, the history of chapter 606 of the Laws of 1918 shows a specific legislative intent to exclude good will and business damage from compensation. It is permissible to consider that history in construing the statute. 36 Cyc. 1138; *People* v. *N. Y. & Man. B. Ry. Co.*, 84 N. Y. 565, affg. 22 Hun, 95; *People* v. *Butler*, 125 App. Div. 384; *N. Y. L., etc., R. Co.* v. *Roll*, 32 Misc. Rep. 321.

As originally passed in the senate and thence sent to the assembly, senate bill 240, which became chapter 606 of the Laws of 1918, provided in section 1, "The court of claims shall have jurisdiction of and

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may hear and determine any claim against the state * * * for or on account of the appropriation by the state of any lands, structures, franchises, rights, easements, good will, established business or other property * * *." The bill was amended in the assembly by eliminating the phrase "rights, easements, good will, established business," and as thus amended, was enacted. The legislative intent to exclude good will as an item of damage thus clearly is established. Furthermore, it seems to us that this statute was not intended to create a new scheme or criterion of compensation, nor to enlarge the scope of the state's liability. To do so in favor of the limited class of claimants, whose claims were affected by the special act, while affording no such remedy to the much larger class, whose claims arising out of the same improvement had been disposed of previously, would effect a gross inequality. It is proper to refer to the title of the act in aid of construction (26 Am. & Eng. Ency. of Law [2d ed.], 628), and this seems to us clearly to indicate the purpose of the act to be merely to extend the time for filing existing claims. Therefore, it affords this claimant no basis for the contention made.

The foregoing discussion is determinative of this phase of the claim. We may add, however, that the claimant has failed to establish that the appropriation destroyed or impaired its good will. It is true that it proved there was difficulty in finding a site in Buffalo which satisfied it, and in completing and equipping a plant there, during the period between the appropriation and the time when it was obliged to vacate the property. It showed, too, that it would be difficult to regain its trade if the latter were interrupted or destroyed. But it does not follow that the claimant was justified, because of these factors, in allowing its good will to perish, without any effort

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other than the claimant made to protect it. It has not shown that other means could not have been used, for instance, that the good will of its business could not have been transferred to some other plant within or outside the city of Buffalo, that another plant could not have been purchased or leased, or that the good will of its business could not have been sold to some other manufacturer. One of its witnesses, Mr. Urban, testified, in substance, that if he wanted a mill at that time he would have paid $250,000 for this good will. The claimant was bound to keep down its damages by all reasonable means, and if any of these or similar methods would have availed, it was bound to use them. The evidence adduced falls far short of proof that the claimant exhausted all reasonable means to keep alive and preserve its good will. Therefore, we find as a fact that the state did not interrupt, impair or destroy the good will of claimant's business, by the appropriation.

It is unnecessary for us to decide whether the last sentence of the description appended to the appropriation map and quoted in this opinion is effective and sufficient generally, and in all cases and under all circumstances, to qualify the appropriation and exclude any part of the machinery or fixtures. Whatever difficulty the phrase " which may be deemed as fairly removable " may create or leave in other cases and under different circumstances, there is no such difficulty here, and our decision and construction of the words are limited strictly to the facts of this case. In *Jackson* v. *State of New York,* 213 N. Y. 34, 35, the court said: " Condemnation is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse should surrender

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to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new."

The court added, in effect, that where the appropriation is not qualified, the state shall be deemed to take all the fixtures, and if such qualification should be made and held proper, that the claimant would then be entitled to receive, as to the fixtures excluded from the appropriation, " the difference between the value of detached articles and the value added to the building when they were used in connection with it." The phrase quoted from the map presents the state's effort to qualify this appropriation, and what otherwise might be a difficult problem is rendered simple by the option agreement executed by the claimant to the state under date of July 28, 1916. By this option the claimant agreed to sell and convey its property to the state under certain conditions for a sum named, and in its delineation of this property used this language:

" GROUP ONE.

" Included in the property is the power plant, consisting of a 300 H. P. engine, two boilers, automatic stokers, heaters, condensers and all appliances for a high grade plant. In addition there is a freight elevator and there is also a complete electric light plant and a complete automatic sprinkler equipment with large pump, iron tower, and tank, giving the lowest rate of insurance; all in first class working order.

" These articles in Group One are to remain in the building and be sold with them to the party of the second part.

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"GROUP TWO.

"Installed in the main building and elevator and not included with the property is the machinery for manufacturing flour, including roller mills, purifiers, sifters, bran dusters, shafting, pulleys, scales, bins and spouting, and other fixed and movable machines used in the manufacture of flour and elevation of grain, *and no part of the buildings proper.*

"These articles in Group Two are not to be sold but are to be removed from said buildings by the party of the first part at its own expense without injury to said buildings within six months from the delivery and acceptance of said Warranty Deed of said premises."

The italics are ours. The paragraph last quoted makes indubitably clear what fixtures and machinery the claimant conceded and admitted to be "fairly removable" upon the sale sought by it. That distinction and interpretation, so made, is fairly applicable here as against the claimant, and with that construction of the phrase the state is content. Therefore, we hold that all the fixtures and machinery referred to in the quoted paragraph, designated "group two," were excluded from the appropriation, and remain the property of the claimant, and that the appropriation included all the fixtures and machinery enumerated in the quoted paragraph designated "group one," and that same have become the property of the state. Our award will include a sum equal to the fair market value thereof at the time of the appropriation. Under the principle of *Jackson* v. *State of New York, supra,* claimant is entitled to recover the difference between the value of the machinery and fixtures excluded from the appropriation and still the property of the claimant for the purpose of

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removal, and the value which same added to the real estate when they were used in connection with it. We find the value of the said machinery and fixtures for the purpose of removal to be $10,000, and the value which same added to the real property when they were used in connection with it $56,682.38, and the difference, which the claimant is entitled to receive as its damage in connection with the machinery and fixtures not taken $46,682.38.

After the appropriation the claimant policed the buildings and machinery by a watchman, and insured them against fire, paying the cost to December 1, 1917. On that date, the canal board, by resolution, authorized the state engineer and surveyor to take such steps as he might deem necessary for the protection of the property, either by insurance or watchman. Pursuant thereto, that official availed the state of the insurance then in force and the claimant paid the premiums. It is obvious that these facts establish no liability in this proceeding for the expenditures made by the claimant for the period prior to December 4, 1917. As to the subsequent period, the liability of the state, if any, is an express contract submitted by law to another officer for audit or determination. Of such a claim this court has no jurisdiction unless it has been rejected by the proper tribunal or officer. Code Civ. Pro. § 264. This item, it would seem, may be presented to the proper auditing officer. We are without jurisdiction of it.

The claimant cannot recover any costs and disbursements herein. Code Civ. Pro. § 274; *Taggarts Paper Co.* v. *State of New York,* 187 App. Div. 843.

Consonant with the foregoing principles an award will be made to the claimant for the value of its lands appropriated $90,000, for the value of the structures appropriated, including all the fixtures mentioned in

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the paragraph above quoted, designated "group one," except the power plant, $90,000, for the value of the power plant appropriated, $8,317.62, and for damages to the machinery and fixtures not appropriated as above set forth $46,682.38, a total award of $235,000, with interest from the date of the appropriation.

ACKERSON, P. J., and WEBB, J., concur.

Award accordingly.

Matter of the Estate of CLEMENT J. TROWBRIDGE, Deceased.

(Surrogate's Court, New York County, November, 1921.)

Wills — construction of — trusts — unlawful accumulation of income — Personal Property Law, § 16 — person presumptively entitled to the next eventual estate — powers of substituted trustees — commissions of trustees — Surrogate's Court Act, § 285.

Where testator bequeathed his entire estate in trust, and excepting $3,000 a year which he directed to be applied for the use of his sister, the net income to the amount of a certain sum, "but no more," was to be applied to the use of his daughter during her life, a further direction that the remainder of said income be applied to the use of the daughter for life, "accumulating for her benefit during her minority, and adding to the principal of the said trust fund so much of said sum as may not be required for her suitable education and support, in addition to the" former bequest to her, is void, as such accumulation of income would be unlawful under section 16 of the Personal Property Law.

The daughter and not her issue is the person presumptively entitled to the next eventual estate, and the contention that her infant children are entitled to all excess income after necessary provision is made for her is untenable.

Where since the daughter became of age she acquiesced in the conduct of the trustees and was content to permit them to

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handle the funds of the estate and await their accounting without any judicial interpretation of the will, the trustees are entitled to commissions upon the investments of income accumulated during the daughter's minority.

The enumerated powers relating to investments conferred by the will upon the original trustees may be exercised by substituted trustees.

PROCEEDING for the construction of a will.

John F. Couch, special guardian, for infant.

Seacard, Ritchie & Young (George W. Schurman and Albert Ritchie, of counsel), for Henrietta O. Littleton.

Geller, Rolston & Blanc, for substituted trustees.

COHALAN, S. There are three questions for the court's determination in this proceeding.

1. The construction of subdivisions I and III of the first clause of the will.

2. Whether the accountants are entitled to commissions upon the securities listed in Schedules A1 and A2 of the account.

3. Whether the substituted trustees may exercise the powers conferred upon the original trustees by the 6th clause of the will.

1. The first question involves an alleged unlawful accumulation of income. The 1st clause of the will provides that in case the testator's only child survives him all his property is bequeathed to two persons named, in trust: "1. To apply the net income thereof, to the amount of ten thousand dollars ($10,000) per annum, but no more, to the use of my said daughter during her life."

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Subdivision II is a direction to trustees to apply $3,000 per annum to the use of testator's sister.

Subdivision III is as follows:

" III. To apply the remainder of the said net income to the use of my said daughter, Henrietta Olive Trowbridge, during her life, accumulating, for her benefit, during her minority, and adding to the principal of the said trust fund so much of the said sum as may not be required for her suitable education and support, in addition to the sum of Ten thousand dollars ($10,000) annually, as aforesaid."

There is no doubt that an unlawful accumulation is directed in the above subdivision and that such a direction is void. (Pers. Prop. Law, § 16; *Pray* v. *Hegeman,* 92 N. Y. 508; *Matter of Megrue,* 170 App. Div. 653.) The special guardian argues that the infant children of the life beneficiary, as the persons presumptively entitled to the next eventual estate, are entitled to all excess income after necessary provision has been made for the daughter. He argues that the words " but no more " in the first subdivision of the first paragraph indicates such an intention. This contention is untenable. The daughter was bequeathed all the income except the sum of $3,000 per annum for the sister. The illegal accumulation was for the daughter's benefit. With this direction stricken from the will there remains the bequest to the daughter of all income, except the small amount provided for the sister during her lifetime. This bequest to the daughter would carry with it all accumulated income. The above cases make it plain that the daughter and not her issue is the person presumptively entitled to the next eventual estate.

2. Questions of commissions do not ordinarily arise until settlement of the decree. Here, however, the account shows that the trustees have taken commis-

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unlawful accumulation.

The daughter claims that the substituted trustees are not entitled to commissions upon the investments of the income accumulated during her minority in accordance with the terms of the will or upon the investments representing the income earned and accumulated since she attained her majority in June, 1904. These investments were turned over to the substituted trustees by the executor of the former trustee. The substituted trustees have already delivered these last mentioned securities to the daughter as the life beneficiary under the trust. The daughter contends that a "wrong" was committed against her by the act of the former trustee in withholding the income that has accumulated since her majority in 1904, and the sums earned by said accumulated income, and resists the claim to any commissions thereon. All income from accumulated income was turned over to her by the present trustees in December, 1919. The trustees continue to hold the securities in which was invested the income that had accumulated during the daughter's minority. When Mrs. Littleton, the daughter, demanded of the accountants that they deliver to her all of the property constituting investments of income accumulated during her majority the trustees took the position that they were "unable to determine the justice and validity of said claim of Henrietta Olive Trowbridge Littleton and are advised by counsel and therefore allege that they cannot without the aid of the court safely determine the said claim and that said claim can only be properly determined by the court

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a proceeding brought for a construction of the said will."

The questions at issue are very similar to those passed upon by me in *Matter of Ziegler,* N. Y. L. J. June 14, 1917. It was there held that "* * * the executors and trustees were justified in withholding the fund until the court determined the question in dispute. The trustees were not merely entitled to such judicial determination for their own protection, but it was their duty to hold the fund until a competent authority determined the doubtful question relating to the disposition of the accumulated income. * * * In an estate of this size, with threatening litigation confronting the executors and trustees, with the usual delays due to the death of some of the parties and from other causes, it seems to me that the executors and trustees acted in good faith and that they are entitled to commissions upon the income from investments from the fund thus properly and in good faith withheld. No case has been found precisely in point, but it seems to me that the executors and trustees come within the provisions of the statute (Sec. 2753, Code of Civil Procedure [now Sec. 285, Surrogate's Court Act]) and that they are entitled to compensation in the usual manner, unless they have been guilty of bad faith or have pursued a course of conduct from which it can be inferred that their prime object in withholding the fund was to increase their compensation. Upon the facts and circumstances herein I believe the executors and trustees are entitled to the usual commissions on the income from the investments of the accumulated net income of the estate to which William Ziegler, Jr., was found to be entitled as of July 21, 1912."

At any time since 1904 the daughter could have applied for a construction of the will or could have sought an order directing the trustees to turn over the

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property. Apparently she has acquiesced in the conduct of the trustees and was content to permit them to handle the funds and await their accounting without any judicial interpretation of the will. They have been permitted to do the work and to assume the responsibility of administering the funds. I am of the opinion that they are entitled to the commissions claimed.

3. The will conferred upon the original trustees the following powers relating to investments:

"Sixth. I direct that my said executors and trustees shall have full power and authority, in their discretion, to keep the property vested in them in the same manner as I may leave it at my decease, or to sell or to change the whole or any part thereof and to invest the proceeds thereof on first mortgages on real estate in any part of the United States, to an amount not exceeding two-thirds of the estimated value, or in any government, state, county or city bonds, or in railroad bonds, secured by first mortgages or first consolidated mortgages or mortgages prior to lien to first consolidated mortgages, or in shares of stock in corporations, provided that such stock does not involve the holder in personal liability greater than now imposed by the general railroad law of the State of New York, and to sell and buy such bonds and stock from time to time at their discretion, but for cash and not upon margin, investing, disposing of investments and reinvesting at their discretion in the said securities as well as in any others that are now permitted by law to Trustees, provided, however, that no more than the sum of One hundred thousand dollars ($100,000) shall be invested in any one security and not more than one-half the amount of the whole investments shall consist of securities other than those now permitted by law and mortgage bonds of railroad companies as aforesaid."

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There is no doubt that the above enumerated powers may be exercised by the substituted trustees. The question is fully covered in *Matter of Jenkins*, 111 Misc. Rep. 517.

Decreed accordingly.

Matter of STILLMAN INFANTS.

(Surrogate's Court, New York County, November, 1921.)

Guardian and ward — infants — divorce — when mother and another will be appointed coguardians of the property of infants — when Surrogate's Court will not make order appointing guardian of the person of infants pending a divorce action.

Where, in a pending action for a divorce, the court has made an order as to the custody of infant children, the Surrogate's Court having due regard to the orderly course of procedure will make no order relating to the guardianship of the person of said infants.

Where the answer to the petition of each of said infants for the appointment of their mother as guardian of their person and estate alleges that the father has in his possession certain property belonging to each infant and that the mother is "wholly without experience in business affairs or in the management or investment of property and is, therefore, not a proper and suitable person to be appointed guardian of the property of said infants," the best interests of the infants will be served by appointing the mother jointly with another well fitted to assist and advise her in administering the property of the infants, and it is so ordered.

APPLICATIONS for appointment of general guardian.

John F. Brennan, for petitioner.

Cornelius J. Sullivan, for respondent.

COHALAN, S. These are two applications for the appointment of a general guardian. James Stillman,

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an infant over the age of fourteen years, petitions for the appointment of his mother Anne U. Stillman as guardian of his person and estate. The mother petitions for her own appointment on behalf of Alexander Stillman, an infant under the age of fourteen years. The father of the infants, James A. Stillman, opposes the appointment of the mother as general guardian of the person upon the ground that in an action between the parents pending in the Supreme Court, Putnam county, one of the issues to be determined is the proper custody of these infants. The Supreme Court has made an order which, among other things, provides as follows:

"That the children, Anne, James and Alexander Stillman, during the pendency of this action may, from time to time, severally elect in the custody of which parent they shall be, and the parent in whose custody they shall be shall, during the time they are in such custody, pay for their education, maintenance and support."

Because of the pendency of this action, in which the Supreme Court has made an order as to the custody of the children, I am not inclined to make any order relating to the guardianship of the person of said infants. I do not think the Surrogate's Court should make any order or decree that might be construed as conflicting in any way with the order of the Supreme Court. Guardianship of the person implies control and custody of the person of the infants. As this is one of the issues to be determined in the Supreme Court action, the fact that the Supreme Court first assumed jurisdiction of this issue and a due regard for the orderly course of procedure impel me to deny this part of the two applications.

The answer in each proceeding alleges that the father has in his possession certain property belonging

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to each infant and alleges that the mother is "wholly without experience in business affairs or in the management or investment of property and is therefore not a proper and suitable person to be appointed guardian of the property of said infant." On the other hand the fact that the father is the custodian of property belonging to the infants, which consists of securities which came to the infants as birthday and Christmas gifts from their father and both grandfathers, renders it advisable, because of the possible adversity of interest, that some one other than the father be appointed general guardian of the infants' estate, as occasion may arise which may render it necessary that inquiry into the investment of such property should be made on behalf of the infants.

As the mother of the infants is alleged to be inexperienced in business matters I think the best interests of the infants will be served by joining some other person with her in the guardianship of the property. I therefore will appoint Anne U. Stillman as guardian of the property and will join with her as coguardian of the infants' property John F. Brennan, Esq., an attorney of broad experience and well fitted to assist and advise the mother in administering the property of the infants.

Ordered accordingly.

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MARY FELLOWS, Appellant, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.

JOSEPH FELLOWS, Appellant, *v.* INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, October Term — Filed November, 1921.)

Evidence — negligence — testimony that train started with a "terrible jerk" admissible.

In an action to recover for personal injuries the plaintiff should not be prevented from testifying in her own language as to how the accident happened, and in any terms which appropriate questions of her counsel may call for.

On the trial of a wife's action to recover for personal injuries, and in her husband's action for loss of her services by reason of the injuries to her, she testified that after boarding a train operated by the defendant company it started with a "terrible jerk" which caused her to fall. At the instance of defendant's counsel and over the objection of plaintiffs' the phrase "terrible jerk" was stricken out. Later she described it as "a terrible and terrific jerk," which was stricken out. Her counsel then asked her: "Was it the usual jerk? A. No." This was similarly stricken out as a conclusion. Finally, her counsel said: "Q. You will have to describe, leaving out the words 'terrible' and 'terrific,' in what manner that jerk of the starting of the train differed from the starting of other trains that you had been riding in." An objection to this question was similarly sustained as calling for a conclusion. The husband testified that the chain connecting the cars "gave a terrible snatch." This testimony was also stricken out and in dismissing the complaint for failure on the part of plaintiffs to prove negligence, the trial judge said: "There is no evidence here which will show that this jerk was any more than the usual jerk which the plaintiff admits cars start with," and added: "I have stricken out the characterization of the jerk because the decisions compel me to do so." *Held*, that the phrases stricken out should have been allowed to stand, and the wife should have been permitted to

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answer how the jerk which threw her differed from the ordinary starting jerk of a train, if it did, and the judgments entered upon the dismissal of the complaints at the close of the plaintiffs' cases will be reversed and new trials granted.

APPEAL by plaintiffs from judgments of the City Court of the city of New York dismissing their complaint at the close of plaintiffs' cases.

Abraham M. Fisch, for appellants.

James L. Quackenbush (William J. Shiels, of counsel), for respondent.

BIJUR, J. These are appeals in two cases, one by the wife for injuries suffered, the other by the husband for loss of her services.

The wife testified that after boarding a train operated by the defendant company it started with a "terrible jerk" which caused her to fall. At the instance of defendant's counsel and over the objection of plaintiffs' the phrase "terrible jerk" was stricken out. Later she described it as "a terrible and terrific jerk," which was stricken out. Her counsel then asked her: "Was it the usual jerk? A. No." This was similarly stricken out as a conclusion. Finally, her counsel said: "Q. You will have to describe, leaving out the words 'terrible' and 'terrific,' in what manner that jerk of the starting of the train differed from the starting of other trains that you had been riding in."

The objection to this question was similarly sustained as calling for a conclusion. The husband testified that the chain (connecting the cars) "gave a terrible snatch," which was stricken out. In dismissing

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the complaint for failure on the part of plaintiffs to prove negligence, the learned court said: "There is no evidence here which will show that this jerk was any more than the usual jerk which the plaintiff admits cars start with," and added: "I have stricken out the characterization of the jerk because the decisions compel me to do so."

Respondent's brief undertakes to sustain these rulings and this view by citing a number of cases in which complaints were dismissed where the plaintiff used similar phraseology, as "sudden stop," "violent jerk," "sudden jerk," etc. It may well be that the mere use of such a phrase is not conclusive upon defendant to establish negligence. The words "terrific jerk," however, have a very clear meaning to most minds, and there is no reason why plaintiff should be prevented from describing in ordinary human phraseology what she actually observed and to expatiate upon and explain it as she saw and felt it so that the jury may determine whether it was the result of negligence on the part of defendant or not. Similarly, of course, defendant is entitled to cross-examine the witnesses to ascertain the exact fact testified to. There is no fetish in the word "jerk" pro or con.

In the instant case plaintiff was prevented from testifying to the actual happening, first, in her own language, and next, in any terms which the appropriate question of her counsel might call for. In my opinion the phrases stricken out should have been allowed to stand and plaintiff should have been allowed to answer how the jerk which threw her differed from the ordinary starting jerk of a train, if it did. *Hassen* v. *Nassau Elec. R. Co.*, 34 App. Div. 71; *Brainard* v. *Nassau Elec. R. Co.*, 44 id. 613; *Sheeron* v. *Coney Island*, 78 id. 476; *Futoransky* v. *Nassau Elec. R. Co.*, 169 id. 719;

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Starkman v. *Interborough R. T. Co.*, 83 Misc. Rep. 62; *Tompkins* v. *Interborough R. T. Co.*, 88 id. 20.

Judgments reversed and new trial granted, with costs to appellants to abide the event.

GUY and WAGNER, JJ., concur.

Judgments reversed.

RHINELANDER REAL ESTATE COMPANY, Respondent, *v.* MATTIE CAMMEYER, Individually and as Executrix of the Estate of ALFRED J. CAMMEYER, Deceased, and "CAMMEYER," Appellants.

(Supreme Court, Appellate Term, First Department, October Term — Filed November, 1921.)

Landlord and tenant — constructive eviction — sub-tenant — surrender — covenant to supply steam relates to premises and is impersonal — when waiver of right to abandon premises will be submitted to a jury.

A covenant in a lease to furnish live steam for the necessary use of the tenant in the conduct of its business relates directly and exclusively to the premises demised and is altogether impersonal.

Defendants, the lessees of plaintiff's building for a term ending February 1, 1919, sublet one of the floors for a term ending simultaneously with the main lease and covenanted to supply their sub-tenant with steam in a certain amount and at a certain pressure. The main lease was cancelled by mutual consent and an agreement entered into by which defendants, in addition to the payment to plaintiff of certain sums at fixed intervals, guaranteed that the rentals of certain named tenants, including said sub-tenant, would be paid to plaintiff until the expiration of the lease. Beginning early in January, 1919, the complaint of the sub-tenant concerning a deficiency in the supply of live steam continued from time to time and was followed by plaintiff's promises of improvement. On August 26, 1918, the sub-tenant by letter formally notified plaintiff that

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because of the failure of steam it had lost one of its government contracts and demanded immediate attention to the defect. The letter not having been answered, the sub-tenant on September tenth, following, notified plaintiff that it had been compelled to secure other quarters and would hold plaintiff for its loss. The sub-tenant having later abandoned the premises this action was brought to recover on defendants' guarantee, the rents for the months of December, 1918, and January, 1919. *Held*, that upon the surrender by the defendants and the acceptance by the plaintiff of the lease between them, the plaintiff both as matter of law and as matter of fact assumed the performance of the covenant to supply live steam to the sub-tenant and a judgment entered upon the dismissal of the complaint at the close of the plaintiff's case will be reversed and a new trial granted.

Defendants were entitled to have the question whether the sub-tenant had not waived its right to abandon the premises with sufficient promptitude, submitted to the jury as requested.

APPEAL by defendants from a judgment of the City Court of the city of New York, in favor of plaintiff, entered upon a verdict directed by the court.

Aronson & Salant (Louis Salant, of counsel), for appellant Cammeyer.

Rose & Paskus, for appellant Mattie Cammeyer.

Scott, Gerard & Bowers (Spotswood D. Bowers, Stewart W. Bowers, of counsel), for respondent.

BIJUR, J. This action was brought to recover from defendants on a guarantee of rents made under the following circumstances:

The defendants were either jointly or consecutively lessees of a building, owned by the plaintiff, for a term ending February 1, 1919. Defendants sublet to a company which I shall call the Moritz Company one of the floors of the building for a term ending February 1, 1919 (simultaneously with the main lease)

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and covenanted to supply the Moritz Company with steam in a certain amount and at a certain pressure. On December 11, 1917, the defendants surrendered their lease to plaintiff and the same was cancelled by mutual consent. An agreement of surrender was entered into, defendants agreeing to pay to plaintiff certain sums at fixed intervals and in addition thereto guaranteeing that the rentals of certain named tenants including the Moritz Company would be paid in monthly installments to plaintiff up to February 1, 1919. Other provisions have no bearing on the present controversy. Beginning early in January, the Moritz Company complained to plaintiff concerning a deficiency in the supply of live steam. There were promises to remedy the defect and occasionally the pressure was improved, but complaints continued and were followed by promises of improvement. On August 26, 1918, the Moritz Company formally notified the plaintiff that by reason of the failure of steam it had lost one of its government contracts and demanded immediate attention to the defect. This letter was not answered, whereupon, on September tenth, the Moritz Company notified the plaintiff that it had been compelled to secure other quarters and would hold the plaintiff for its loss; and on November 30, 1918, abandoned the premises. This action was brought to recover on defendants' guarantee of the rents for the months of December, 1918, and January, 1919.

The defense litigated was the constructive eviction of Moritz Company by the failure of plaintiff to furnish steam necessary to carry on the business as provided in the sublease between defendants and the Moritz Company.

Plaintiff seeks to sustain the direction of the verdict below on two grounds: *First,* that upon the authority of *Miller* v. *Clary,* 210 N. Y. 127, the covenant of de-

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fendants to supply live steam to the Moritz Company would not pass with the land; and *second,* that the Moritz Company did not exercise its right to abandon the premises with sufficient promptitude and therefore waived this right.

There is a minor point to the effect that the supply of steam to the Moritz Company affected only part of its business and that, therefore, failure to supply it was not a sufficient reason for abandoning the premises; but as this was manifestly a question for the jury, if it was a question at all, I shall not discuss it.

As to the first point urged by respondents, namely, that an "affirmative or positive covenant" does not "run with the land," it is indeed so held in *Miller* v. *Clary* with the added statement that there are, however, "certain exceptions to this rule, as * * * *covenants in leases*" (p. 132). To what extent covenants in leases may or may not "run with the land" is not determined in the *Miller* case nor adverted to except quite casually. Indeed, the phrase "run with the land" is not particularly apt as applied to covenants in leases. The question there is more frequently and perhaps more appropriately described as being whether the covenant is "personal" or "collateral" on the one hand, or, on the other hand, whether it "attaches to and operates upon the estate" or "respects the thing demised" or is one "touching or concerning the thing demised as affecting the value of the reversion or the term or influencing the rent." See *Norman* v. *Wells,* 17 Wend. 136, and *Verplanck* v. *Wright,* 23 id. 506, both going back to the famous resolutions in *Spencer's Case,* 5 Rep. 16. The subject is also further considered in *Commonwealth Mtg. Co.* v. *DeWaltoff,* 135 App. Div. 33; *Storandt* v. *Vogel & Binder Co.,* 140 id. 671, and *Schoellkopf* v. *Coatsworth,* 166 N. Y. 77. In the light of these decisions it seems

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clear that the covenant to furnish live steam for the necessary use of the tenant in the conduct of its business relates directly and exclusively to the premises demised and is altogether impersonal.

Although respondent insists that the Moritz Company remained and was regarded by the parties as the tenants of defendants even after the surrender of the latter's lease to plaintiff, the decisions are directly to the contrary. Beginning with the leading case of *Eten* v. *Luyster*, 60 N. Y. 252, and continuing through a long line of cases which have followed it, in particular *Ashton Holding Co.* v. *Levitt*, 191 App. Div. 91, and *Oshinsky* v. *Greenberg*, 39 Misc. Rep. 342, it has been consistently held that upon surrender of his lease by the main lessor the under tenant "becomes the immediate tenant of the original lessor" and "the interest and the terms of the subtenant of the lessee continued as if no surrender had been made."

If then plaintiff became Moritz's landlord and the Moritz Company plaintiff's tenant upon the terms of the Moritz Company's lease, it is difficult to escape the conclusion that as matter of law plaintiff became bound to perform this covenant of the Moritz lease which had originally been undertaken by the defendants as the intermediate landlord.

Apart, however, from this conclusion as matter of adjudicated law, the inescapable implication of fact would be to the same effect. Not only was respondent aware that defendants had made subleases and aware of the identity of the sublessees, but it required defendants to guarantee the payment of rent by the sublessees thereunder. If plaintiff deliberately chose to remain in ignorance of the terms of the subleases it could not escape responsibility for the knowledge which the barest inquiry would afford. *Anderson* v. *Connors*, *infra*, 387. It requires no argument to

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demonstrate that had respondent obtained the information which was available to it it would necessarily have concluded that defendants who were surrendering their lease could not supply live steam to the Moritz Company and that no one could be expected to perform the defendants' covenant in that respect except respondent, nor could there be any doubt but that the Moritz Company would expect that covenant of its lease to be observed before it was called upon to perform its correlative duty of paying the rent. An almost similar case is *Anderson* v. *Connors*, 43 Misc. Rep. 384; approved in *United Realty Co.* v. *Stoothoff*, 133 App. Div. 245.

My conclusion, therefore, is that upon surrender by the defendants and acceptance by the plaintiff of the lease between them, the plaintiff, both as matter of law and as matter of fact, assumed the performance of the covenant to supply live steam to the Moritz Company.

In regard to the respondent's second contention that the Moritz Company did not vacate the premises with sufficient promptness, it seems clear that the constant complaints and constantly following promises to improve the condition bring this case clearly within the reasoning of *Ryan* v. *Jones*, 20 N. Y. Supp. 842; *Greacen* v. *Barker*, 130 id. 141, and *Perry-Freeman Co.* v. *Murphy*, 164 id. 74.

At best the defendants were entitled to have the questions involved in this contention submitted to the jury as directly and specifically requested by them in great detail.

Judgment reversed and new trial granted, with costs to appellants to abide the event.

GUY, J., concurs; WAGNER, J., not sitting.

Judgment reversed.

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In the Matter of the Application of JOSEPH H. BENNETT for an Order of Mandamus Directed to WILLIAM MEYER, Chairman, CATHERINE CAMERON, WALTER MELIUS and WALTER DEWEY, Composing the Board of Inspectors of the First Election District of the Town of Green Island, Third Assembly District of the County of Albany and State of New York.

(Supreme Court, Albany Special Term, November, 1921.)

Elections — ballots — cross mark of four lines held not void.

Upon the canvass of the votes cast at the general election held November 8, 1921, the board of inspectors set apart one ballot as void as to the vote for overseer of the poor of the town of Green Island, because, as appeared upon the examination under an order to show cause, in the square to the left of the name of the Republican candidate for that office, the voter, an intelligent man, made a cross mark consisting of four lines. *Held,* that taking into consideration the admission that such mark could not have been made for the purpose of identification and that the voter's hand was somewhat tremulous, that he voted a split ticket, the ballot should not have been declared void, and an order will be granted directing a recanvass of the vote for overseer of the poor by correcting the same in accordance with the decision hereon.

APPLICATION for an order of mandamus.

Kenneth S. MacAffer, for petitioner Joseph H. Bennett.

William T. Byrne, for intervener Michael Brennan.

RUDD, J. In the first election district of the town of Green Island at the last general election, November eighth inst., the Democratic candidate for over-

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seer of the poor was Michael Brennan and the Republican candidate Joseph H. Bennett.

Upon the canvass of the votes the board of inspectors set apart six of the ballots as void as to all candidates upon the ballots. They set aside and apart one ballot as void as to the vote for overseer of the poor.

Under an order to show cause these seven ballots were examined. Upon such examination no question survives as to the six ballots declared void as to all candidates. The question here submitted is as to whether the ballot marked Exhibit A is void as to the vote for overseer of the poor. It was declared void by the board of inspectors, which decision the intervener asks this court to sustain, because in the square on the left of the name of Joseph H. Bennett the voter made a cross which consists of four lines, and the intervener claims that thereby, the ballot being thus marked makes it void as to the vote for that office.

It is admitted upon the presentation of this claim by the attorney representing the intervener that the intention of the voter so far as the vote cast for overseer of the poor is concerned is clear. The claim being that because of the form in which the cross is made that the ballot is thus marked in violation of the provisions of the statute and the vote for that particular office is thereby made void.

Upon an examination of the whole ballot it appears that the voter cast his vote in many instances irrespective of party. He voted for the Democratic candidates for associate judge of the Court of Appeals, two justices of the Supreme Court, member of assembly, surrogate, sheriff, coroner, two justices of the peace, assessor (short term), town collector, and he voted for the Republican candidates as follows: supervisor, town clerk, assessor (long term), and school

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director and in one instance where he was called upon to vote for two candidates for the office of constable he voted for one Republican candidate and for one Democratic candidate.

He was what might fairly be called an independent voter. He was apparently also an intelligent voter, not making any mistakes as to the manifestation of his choice.

It also appears in careful examination of his marks for the candidates for whom he voted other than overseer of the poor that his hand was somewhat tremulous, that in two or three instances, notably in the blocks for one of the justices of the Supreme Court, surrogate, school director and constable, there are marks, very slight in form, indicating a running back and forth of the pencil, or a trembling, or an effort to be sure to make the cross mark legible.

The mark under consideration in the square opposite the name of Joseph H. Bennett is somewhat more exaggerated than the marks just above referred to, but is of the same general character. There was made in this square a cross consisting of two lines, then the voter evidently started to superimpose a line upon one of the lines first written, and he joined the lines at the top, separated them slightly in the middle and joined them at the bottom, showing clearly an intention to superimpose one line upon the other. What we will call the fourth line started at the top of the line already there and ran away from it, but crossed the line already in position.

Having in mind that the intention of the voter is manifested, and is admitted, and that such a mark could not have been made for the purpose of identification, that the hand of the voter was evidently somewhat tremulous, that he voted a split ticket, selecting evidently as candidates for the local offices

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those with whom he had a personal acquaintance, it does not seem to this court as if under the law the voter's ballot for overseer of the poor should have been declared void.

In *People ex rel. Colne* v. *Smith,* 188 App. Div. 834, 840, it was held: "But voting more than once for the same candidate by making a cross mark in the voting space opposite his name in different columns, *or making a heavy cross consisting of more than one line crossing another and with flourishes or separated at the end, evidently made by the voter in running the pencil back and forth,* or making a × in the marked out space not requiring a × where the name of a candidate is written in, or a cross of double lines or evidently accidental dots or pencil lines, writing part of a name of a candidate whose name is not printed in the space for writing in a name * * * does not invalidate the ballot. * * * In determining whether a cross mark complies with the law and whether slight lines or dots were accidentally made, allowance must be made for infirmity of the voter as to eye-sight or physically * * *."

The conclusion is that Joseph H. Bennett is entitled to the vote for overseer of the poor as manifested by the voter's intention, as to which the board of inspectors declared the vote void.

An order may be entered directing the board of inspectors to meet and recanvass the vote for overseer of the poor by making the correction in accordance with this memorandum.

Ordered accordingly.

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PEOPLE OF THE STATE OF NEW YORK ex rel. NICOLA DESIDERIO and the TRADERS NATIONAL BANK OF ROCHESTER, v. HENRY CONOLLY, WALTER A. SWAN and ROBERT B. WILSON, Constituting the Board of Sewer Commissioners of Sewer District No. 1 in the Town of Brighton, New York, and the Town Board of the Town of Brighton.

(Supreme Court, Monroe Special Term, November, 1921.)

Mandamus — town board — demurrer to alternative writ — payment to contractor for construction of sewer — parties — when surety not necessary party.

Where a town board, after raising the money to pay for the construction of a sewer extension, duly ordered, fails as in duty bound to pay the money over to the sewer commissioners, it may be compelled by mandamus to perform that duty.

Where it is made to appear that the relator substantially performed the contract until under a clause thereof the work was taken over by the sewer commissioners; that there is due to him a certain sum upon the contract, a part of which has been assigned to the other relator, that of the amount raised by the issue of town bonds for the sewer construction there remains, after expenditures, a balance of more than sufficient to pay the claims of both relators, demand therefor having been made, a demurrer interposed by the sewer commissioners and also by the town board to an alternative writ of mandamus will be overruled.

The surety on the contractor's bond was not a necessary party to the proceeding if, as alleged, the contractor had substantially performed the contract, and money was due and owing to him thereunder.

Relators' cause of action being for money due under the contract and it requiring successive steps by both boards to raise the money, both of which steps having but one result, that is, payment of moneys claimed to be justly due relators, it was proper to join both boards in one proceeding and compel action therein by both.

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Whether the defendants, for lack of sufficient funds on hand to meet the relators' claim, may be compelled to take steps under the statute to raise the money for that purpose, it is not necessary now to determine.

DEMURRERS to an alternative writ of mandamus.

Clarence W. McKay (Frederick W. Oliver, of counsel), for relators.

Edwin C. Smith, for town board of the town of Brighton.

Walter A. Swan, for board of sewer commissioners.

CUNNINGHAM, J. An alternative writ of mandamus has been issued commanding defendants to pay to relators a sum claimed to be due upon a contract for the construction of an extension sewer, or to show cause why the writ should not be obeyed.

The sewer commissioners and the town board have interposed demurrers to the writ.

The creation and extension of sewer districts, the raising of money to pay for sewers in such districts and the execution of contracts for the construction of such sewers or extensions are permitted by sections 230–239 of the Town Law. The town board is empowered to create the district, to appoint the sewer commissioners and to raise the money for the construction of the sewer.

The sewer commissioners are authorized to contract for the construction of the sewer and to levy a local assessment for the cost thereof, and the moneys realized therefrom are paid to the town to reimburse it for bonds issued.

The cause of action stated by relators is that an extension of a sewer district was duly ordered and

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sewer commissioners duly appointed, that the sewer commissioners entered into a contract with the relator, Desiderio, for the construction of the sewer extension, that he substantially performed the terms of the contract until the work was taken over by the sewer commissioners under a clause in the contract, and that there is due to him upon the contract the sum of $23,638.29, of which $10,000 has been assigned to the relator Traders National Bank. That the town board has raised the sum of $185,000 by the issue of bonds for the construction of such sewer extension and has expended therefrom the sum of $144,000 and that the balance is still in the hands of the town board. That both the town board and the sewer commissioners have failed to make provision for the payment to relators of the sum due them, although demand therefor has been made.

The writ seems to me to set forth a cause of action based upon the failure of defendants to perform duties imposed upon them by law. It was the duty of the town board, after raising the money, to pay same over to the sewer commissioners to be expended by them for the construction of the sewer extension. As they still have the money in their possession they have failed in this duty and they may be compelled by mandamus to perform it. *Holroyd* v. *Town of Indian Lake,* 180 N. Y. 318; *People ex rel. Farley* v. *Winkler,* 203 id. 445.

The sewer commissioners, if anything were due to relators under the contract, were obliged to pay the same to them and their neglect to do so, as stated in the alternative writ, constitutes a failure of duty which they may be required to fulfill by mandamus. Cases cited *supra.*

The writ further alleges that in the demand for payment served upon the defendants it was required that

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defendants forthwith pay to relators the sum due and "that if they claimed that they hadn't that amount of money in the funds for the construction of the sewer system" that the sewer commissioners serve notice on the town board to raise such moneys and that the town board proceed to raise the amount necessary. That defendants have neglected and refused to pay said sum so due and "neither the town board or the board of sewer commissioners have taken any proceedings under the statute to raise the sum necessary for the payment thereof." It is claimed that the allegation just quoted is a statement that there are no moneys on hand applicable to the payment of relators' claim. In view of the other averment in the alternative writ that bonds in the amount of $185,000 have been issued and sold and that $144,000 of this has been expended and that the balance remains in the hands of the town board, I believe that the allegation cannot be construed in the manner claimed by defendants. It seems to me it is, in effect, an assertion that no *further or different* action was taken by the defendants.

One of the grounds of demurrer is that there is a defect of parties plaintiff in that the surety on the bond of the relator Desiderio is not a party to this proceeding. If, as is alleged by relators, Desiderio substantially performed the terms of the contract and there is money due and owing to him under such contract, the surety on the bond is not a necessary party to this proceeding.

It is contended that separate causes of action exist against the sewer commissioners and the town board and that it is improper to unite such causes of action in one proceeding and that there is a defect of parties defendant in making both boards defendants in this proceeding. Relators' cause of action is for money

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due under a contract. It requires successive steps by the two boards to raise this money and to pay relators, but these successive steps have one result, that is the payment of moneys claimed to be justly due relators. Under such circumstances it is proper to join both boards in one proceeding and compel action by both of them in such proceeding. *Labette County Commissioners* v. *United States ex rel. Moulton*, 112 U. S. 217.

I agree with Mr. Justice Stephens, who granted the alternative writ, that the contentions that the proceeding is premature because the sewer is not completed, that the work has not been abandoned but only suspended and that all of the moneys raised for the construction of the sewer have been expended, are matters which should be proved in defense, at which time the sufficiency of such defenses can be decided. I believe the alternative writ sets forth a cause of action based upon the failure of the town board to turn over to the sewer commissioners the moneys raised for the construction of the sewer and upon the failure of the sewer commissioners to pay to relators the sum claimed by them to be due.

It is not necessary, therefore, to determine at this time whether the defendants may be compelled to take steps under the statute to raise money to pay relators' claim if they have not sufficient funds on hand to meet it. The demurrers are overruled.

Demurrers overruled.

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THE BROAD EXCHANGE COMPANY et al., Plaintiffs, *v.* THE CURB STOCK AND BOND MARKET OF NEW YORK, INC., Defendant.

(Supreme Court, New York Special Term, November, 1921.)

Highways — nuisance — unreasonable obstruction of a street constitutes a public nuisance — injunction.

The primary purpose of a street is for traveling, and whatever causes an unreasonable obstruction or interference therewith constitutes a public nuisance.

Where in an action to restrain defendant, a board of trade corporation, from unlawfully occupying and obstructing a street within the financial district of the city of New York, it is clearly established to the satisfaction of the court that plaintiffs are being subjected to special damages by reason of the defendant and its members continuing to conduct in said street, in the immediate neighborhood of plaintiffs' properties located on said street, an open air market for the sale of securities, a motion for an injunction *pendente lite* will be granted.

Such occupancy of the street by defendant and its members for business purposes constitutes a flagrant public nuisance, and had the police, as in duty bound, removed from the street all persons attempting to use it for trading purposes in the manner complained of, the application for injunctive relief would have been unnecessary.

MOTION for an injunction *pendente lite*.

Parker & Aaron, for plaintiffs.

Oeland & Kuhn, for defendant.

LYDON, J. This is a motion for an injunction *pendente lite*. The plaintiffs in this action are the owners of valuable lands and buildings on Broad street, between Exchange Place and Beaver street, in the borough of Manhattan, city of New York, and they

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move for an injunction to restrain the defendant and its members from unlawfully occupying and obstructing Broad street in the immediate neighborhood of their buildings. In the month of December, 1920, the defendant was incorporated as a board of trade corporation, and as the moving papers show it has, since June 27, 1921, conducted a stock exchange or securities market on Broad street in the highway thereof. Its business is conducted on Saturdays from ten A. M. until noon, and on all other business days from ten A. M. until three P. M. This particular section of the city is what might be called the southerly side of the financial district, and during the hours within which the defendant conducts its business, this particular section of the city is extremely crowded by the employees and officers of the numerous banks, stock exchange houses and other business offices in that immediate neighborhood. The moving affidavits and photographs attached show, that the defendant has appropriated for its private use about one-half of the vehicular roadway of Broad street about 100 feet south of Exchange Place, and in this space the members of the defendant corporation gather daily to conduct their business, and necessarily in reaching the place where they trade, they pass in great numbers over the sidewalks immediately adjoining, causing congestion and in addition, attract curious crowds upon the sidewalks who watch the operation of the brokers connected with the defendant corporation. The affidavits herein, made by some real estate experts, show that "at times, owing to the said 'Curb Market' and the accumulation of people trading in the same and standing about as observers or sightseers, it is difficult for passers-by to make their way through the crowds, and it frequently requires elbowing and shoving to do so." It is further shown by the

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complaint which is verified by the seven plaintiffs, "That during said sessions the defendant has appropriated and occupied and appropriates and occupies at the site in question a large part of the said street approximating one-half of the roadway thereof and extending for a width of about sixty (60) feet or more, all of which is regularly taken up and appropriated by the defendant's members in the conduct of said outdoor exchange or market, and from which the public is excluded and through which traffic to and fro by foot and vehicular travel is obstructed and prevented. That by collusion and understanding with the Police Department, the defendant has during said sessions caused to be separated from the roadway at the site in question, by a line of heavy posts, for the exclusive use of its members as traders in said outdoor exchange or market, said area so appropriated for the use of its members, and from which it has excluded the public, and at times has caused said space to be roped-off during said hours for its exclusive use and occupancy."

At the point where the defendant and its members conduct these operations, the width of the roadway of Broad street is forty-two feet, and the defendant assumes to rope off for its exclusive use for trading purposes, one-half of the roadway in said street, thus leaving only a small portion of the roadway for vehicular traffic, and even that space is more or less constantly used by members of the defendant in passing from the trading ground to the sidewalk. In addition to that, it is shown that both on the east and west sidewalks immediately adjoining this roped-off area, that exclusive of pedestrians actually passing the place, there are crowds of from 100 to 150 people standing on the sidewalks, who are either interested in the operations of the said trading market or are

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sight-seers who block the sidewalks, while the number of persons in the roadway during said hours number from 70 to 90 persons.

The claim of the plaintiff in this action is, that the defendant is guilty of a public nuisance in assuming to appropriate for its own personal use a part of the public highway, and in doing so these plaintiffs are subjected by the said nuisance to special damages, which are not merely such as the general public are subjected to. If that is so, then the plaintiffs clearly are entitled to injunctive relief. It is abundantly settled that the primary purpose of the street is for traveling, and that whatever causes an unreasonable obstruction or interference with travel, becomes a nuisance.

The defendant claims that a large number of persons, other than members of the defendant corporation, as well as some of the members of the corporation, have, for a great many years, without objection on the part of anybody, pursued peacefully their business of buying and selling securities in that part of Broad street known as the "Curb." It further states that this practice has followed a long established and well recognized custom on Broad street, or its immediate vicinity, dating back for more than 150 years. I do not understand the force of this allegation, as I cannot believe that either the defendant's president, who made the affidavit, or the counsel for the defendant, have any idea that they have acquired any prescriptive right to use the street, and so far as the injury to the plaintiffs go, it is a continuing damage, and no length of time as alleged by the defendant would bar a complaint by the plaintiffs as against the continuance of the nuisance.

It is quite true that for a long period of time and up to about a year ago, what was known as the "Curb

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Market" was conducted at or about the same place on Broad street where the defendant and its members now operate, and the same general line of business was conducted, to wit, dealing in securities which are not listed on the New York Stock Exchange. The great majority of those former traders were members of the New York Curb Market Association, and about one year ago the said association, the membership of which constituted the greater number of those who traded in securities on Broad street at that time, removed their highway exchange into a new building, which they purchased, in which to conduct their said business, and the said New York Curb Market Association, although now in its new exchange building at No. 73 Trinity Place, borough of Manhattan, city of New York, continues to be known as the "Curb Market." Upon the members of the said association leaving the Broad street site, the members of the defendant, and some outsiders, continued to trade in securities on Broad street where the members of the former Curb Market Association had conducted business, and in the year 1920 this defendant was incorporated, after the New York Curb Market Association had removed to indoor quarters. It is on the theory of succession, apparently, that the defendant and its members claim to have a right to trade on this portion of the highway because their alleged predecessors traded on that site prior to the erection of the buildings owned by the plaintiffs.

The moving affidavits and the complaint clearly point out the special damages which the plaintiffs claim to have suffered. All the buildings and premises owned by the plaintiffs are located in a block on Broad street, between Exchange Place and Beaver street; the said block being about 465 feet in length, and at the site in question the width of the roadway of Broad

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street is slightly over 42 feet and continues to broaden in width to the north until at the corner of Exchange Place it reaches a width of about 52 feet in the roadway. The buildings on this block are rented for offices and banking-house purposes, and the plaintiffs have found, in one case, that prospective tenants objected to the existence of the Curb Market on said block; that objections have been registered with the plaintiff owners by their existing tenants complaining of the existence of the present Curb Market, upon the ground that it causes obstruction and congestion at the point at which it is carried on, which interferes with the freedom and comfort of travel, both foot and vehicular, along the said block, and tends to isolate these properties from other sections of the financial district; that these conditions injure the property on said block, make it more difficult to rent the same, and depress the rental value thereof.

After a careful examination of all the papers submitted on this motion, I am forced to the conclusion that the plaintiffs are entitled to an injunction, as the facts submitted clearly establish, to my mind, that the plaintiffs are being subjected to special damages by reason of the defendant and its members continuing to conduct an open-air market for the sale of securities in Broad street in the immediate neighborhood of the plaintiffs' properties.

In the case of *Wakeman* v. *Wilbur,* 147 N. Y. 657, 663, the court, said: "The obstruction of a public highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages by him sustained. (*People* v. *Kerr,* 27 N. Y. 193; *Davis* v. *Mayor,* 14 id. 506; *Adams* v. *Popham,* 76 id. 410; *Chipman* v. *Palmer,* 77 id. 51.) The extent

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of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal, and the fact that numerous other persons have been injured by the act is no ground for a denial of the relief. When the damage or injury is common to the public and special to no one, then redress must be obtained by some other proceeding in behalf of the public and not by a private action."

Again, in the case of *Callanan* v. *Gilman,* 107 N. Y. 360, 371, the court, said: "That the plaintiffs suffered some special damage not common to persons merely using the street for passage is too obvious for reasonable dispute. Direct proof of the damage was not needed. All the circumstances show it." The above language is quite appropriate to the case at bar.

Again, in the later case of *Ackerman* v. *True,* 175 N. Y. 353, 360, the court, said: "It is well established by the decisions of this court that interferences with public and common rights create a public nuisance, and when accompanied with special damage to the owner of lands give also a right of private action to such owner, and that a public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes also a private nuisance. That this encroachment upon the street was a public nuisance and that as to this plaintiff it was a private nuisance, we have no doubt." This language can be used with the same judicial force in the instant case, because the evidence before me shows that this improper use of Broad street has a tendency to, and actually does, impair the value of the adjoining property of the plaintiffs, and makes it more difficult to rent the same and reduces considerably its rental value. Clearly, this is a special and peculiar injury to the plaintiffs, and injunctive relief should be granted.

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Attached to one of the moving affidavits are copies of articles which appeared in a newspaper known as the *New York Curb,* of June 25, 1921, which calls itself the official paper of the New York Curb Market, and which copies the affiants received from the defendant's president. One article is entitled "City's approval of Continuance of Outdoor Trading * * *," and then recites: "Mr. Cook explained that he and the other officers of the organization had received assurances from the City authorities that Broad Street, between Exchange Place and Beaver Street, would remain open to the members as long as they wished to use it as the only real 'Curb Market.' On the subject of strict enforcement of City Ordinances Mr. Cook added that The Curb Stock and Bond Market would see to it that none of its members or employees of members would be permitted to commit any nuisance of any kind."

Then further in the issue of July 2, 1921, it is stated that the officers of the defendant corporation had interviewed the mayor of the city and the police commissioner and had secured their assent and approval to the occupancy of the site in question by the defendant and its members, and further, that the defendant and its members would be protected in their use of the street for business purposes. Of course, the statement that the mayor and the police commissioner had approved and assented to such use of the public street cannot be given any credence. It is to be presumed that public officers perform their duties and careless statements in newspapers to the contrary should be disregarded in the absence of proof. However, one fact remains self-evident and that is, that the police department for years has, by its inactivity, sanctioned this illegal use of the street by not only this defendant and its members and such others as

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may trade there, but also the former Curb Market. The occupancy of said Broad street by the defendant and its members for business purposes is nothing short of a flagrant public nuisance, and if the police did their duty, they would remove from Broad street all persons who attempt to use it for trading purposes in the manner complained of. Had the police performed their duty this application would have been unnecessary. Motion granted, with ten dollars costs.

Motion granted.

Matter of the Transfer Tax upon the Estate of EDWARD FLYNN, Deceased.

(Surrogate's Court, Bronx County, November, 1921.)

Transfer tax — trust deed — gift to take effect at death of decedent — Tax Law, § 220(4).

Decedent had executed a deed which provided for the transfer of $5,000 upon the trust to pay the income to him during his lifetime and upon his death to pay to the *cestui que trust* the principal with accumulations of income not theretofore paid. In the event of the prior decease of the *cestui que trust,* the principal of the trust fund with all accumulations of income was to be paid on demand to decedent and the trust thereupon to terminate. The deed also provided that the trust might be terminated by decedent at any time upon written notice to the trustee, in which event the securities or cash composing the trust fund were to be delivered by the trustee to decedent and become his property as if the deed had not been made. Three years later the deed was modified by a written agreement which in effect provided that nothing therein contained should transfer any ownership to the *cestui que trust* prior to the death of decedent, unless she made demand therefor during her lifetime. She made no such demand and received no part of the principal of the trust fund. *Held,* that the gift to her took effect in possession and enjoyment at the death of the decedent, and under section 220(4) of the Tax Law was subject to a transfer tax.

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Misc.] Surrogate's Court, Bronx County, November, 1921.

PROCEEDINGS on an appeal from an order assessing a transfer tax.

Secord, Ritchie & Young, for executor and another, appellants.

John J. Boyle, Jr., for State Tax Commission.

SCHULZ, S. This is an appeal from an order entered upon the report of the appraiser in a transfer tax proceeding in so far as it adjudged that a transfer to one Mary Florence Martin under a deed of trust dated March 11, 1914 (in the notice of appeal stated to be dated March 14, 1914), and subsequently modified by an agreement dated March 26, 1917, is taxable.

The deed of trust provided for the transfer to a trust company of the sum of $5,000 upon the trust to pay the income to the decedent during his life, and upon his death, to pay to the *cestui que trust* the principal with accumulations of interest not theretofore paid. In the event of the latter's death before that of the decedent, the principal of the trust fund with all accumulations of interest were to be paid on demand to the decedent and the trust thereupon terminated. It contained the following provision: "This trust may be terminated by the party of the first part at any time during his life by giving the Trustee a notice in writing of his desire to terminate the same."

In such event the securities or cash were to be delivered by the trustee to the decedent and became the property of the decedent, as if the trust deed had not been made.

The agreement of March 26, 1917, modified the trust deed aforesaid and provided as follows: "The said deed of trust be and the same is modified to the extent of permitting the said Mary Florence Martin without

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permission of Edward Flynn to withdraw from the Trustee, the whole or any part of the principal of the trust fund in the hands of said Trustee, and on her written demand, the Trustee shall assign or turn over to her cash or securities in which such trust fund may be invested to the extent that she shall demand the same. Such part of said trust fund as the said Mary Florence Martin may not so demand during her lifetime shall be paid over to her upon the death of Edward Flynn as provided in said trust agreement provided she survives said Edward Flynn, but if she does not so survive him, that part of the trust fund not demanded by her during her lifetime, on her death shall become the property of and shall be assigned to said Edward Flynn. Nothing herein contained shall transfer any ownership in any part of said trust fund to said Mary Florence Martin prior to the death of Edward Flynn unless she makes demand therefor during her lifetime as hereinbefore set forth. If Edward Flynn should give the trustee notice in writing of his desire to terminate the trust, the same shall have no effect whatever on any demand made by Mary Florence Martin as aforesaid at the same time or prior to the receipt by the Trustee of the notice of such termination which shall operate only upon the balance of such trust fund in the hands of the Trustee which shall remain after satisfying any such demand."

The statute provides that property is taxable when a transfer thereof is made " * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death." Tax Law (Cons. Laws, chap. 60), § 220, subd. 4.

There is nothing before me which would warrant a finding that the deed was made in contemplation of

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the death of the decedent, so that the only question to be determined is whether or not the gift was intended to take effect in possession or enjoyment at or after the death of the grantor.

It has been held that the mere right to revoke a trust, if unexercised, does not of itself justify the conclusion that the gift took effect in possession and enjoyment only at the death of the decedent, when the right of revocation could no longer be exercised. *Matter of Masury,* 28 App. Div. 580; affd., without opinion, 159 N. Y. 532; *Matter of Isaac H. Wing* (Cohalan, S.) N. Y. L. J., Nov. 9, 1921. Hence, such provision in this deed, heretofore quoted, is not conclusive upon the question presented. If she did not demand any of the principal during his life and before or at the same time that he terminated the trust and did not survive him, she would receive no part of the principal or income.

It is urged that because the appellant had a right to receive all of the principal during the life of the decedent upon her demand, it follows that the transfer took place at the date of the execution of the deed and that we should regard that as done, which might have been done, under its provisions. I cannot agree with that contention, however, because whatever doubt there might otherwise have been, is dispelled by the language of the document which seems to clearly show a contrary intent. I refer to the provision quoted above to the effect that nothing contained in the modifying agreement shall transfer any ownership to the appellant prior to the death of decedent unless she makes demand therefor during her lifetime.

It appears that the appellant made no demand for any part of the principal during the lifetime of the decedent and received no part of the principal and I

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therefore reach the conclusion that this gift took effect in possession and enjoyment at the death of the testator and is taxable. *Matter of Garcia,* 183 App. Div. 712; *Matter of Miller,* 109 Misc. Rep. 267. In doing so, I have given due consideration to *Matter of Masury, supra; Matter of Bostwick,* 160 N. Y. 489; *Matter of Bowers,* 195 App. Div. 548; affd., no opinion, 231 N. Y. 613, and *Matter of Isaac H. Wing, supra.*

In the *Masury* matter a number of trusts were involved, as to all but one of which it was decided that the transfers were not liable to taxation. The court discussed one of the latter which was typical of the others held not taxable. The trust deed provided that the income be paid to the guardian of the infant beneficiary until he arrived at the age of twenty-one years at which time all net avails of income, etc., were to be paid to him and that the principal was to be paid to him upon a date fixed in the instrument. In the event of his death before maturity, the principal went to his legatees, or, if he died intestate, to certain of his next of kin. The payment of the principal was in no way contingent upon the death of the grantor but was payable upon the arrival of a fixed and certain date, and the Appellate Division in its opinion stated that the grantor " intended this deed of trust to become of full effect whether he lived or died, and the detail with which he provided for the disposal of the property in the event of the death of his grandson precludes the idea that he had any other motive in retaining the right to annul the deed than a prudent caution would suggest."

It is manifest that no such condition exists in the pending matter. The trust deed under consideration is more like the one trust instrument in the *Masury* matter under which it was held that the transfer was taxable.

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In *Matter of Bostwick, supra,* the court, commenting upon the *Masury* case, said: "There appeared to be nothing in the transaction, which pointed to the existence of an intention on the part of the donor that his transfer should not be absolute, or that the beneficial enjoyment of his gift should be postponed until his death." That certainly may not be said of the transaction under consideration.

That the *Masury* matter was an exceptional case is further evidenced from the opinion in the *Bostwick* case, the learned judge saying: "I think we may have gone too far in generally affirming the *Masury* decision; certainly the limit was then reached, beyond which the courts could not go without emasculating the provisions of the statute."

Nor do I read *Matter of Bowers, supra,* as an authority for holding this transfer not taxable. The essential difference between the document there considered and the one in this matter is evident from the statement in the opinion that "There can be no question that by the terms of the foregoing provision John M. Bowers vested in the trustees the property thereby transferred with no right of reversion in himself." In the present case there is a right of reversion in the decedent which might have been nullified by a written demand of the beneficiary, which was not made.

The last reported decisions bearing upon the question are that in *Matter of Isaac H. Wing, supra,* and that in *Matter of Eva S. Cochrane,* 117 Misc. Rep. 18, holding that the transfer of trust funds under the conditions there stated are not taxable, but there also the facts were materially different from those in this matter. The order appealed from is affirmed.

Order affirmed.

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Matter of Proving the Last Will and Testament of WILLIAM H. SHIELDS, Deceased.

(Surrogate's Court, New York County, November, 1921.)

Wills — missing duplicate — probate of other duplicate directed.

A few days after testator had made in duplicate a typewritten will he received from the scrivener one of the duplicates and took it with intention to place it in his safe-deposit box, but it was never seen again and cannot be found. *Held*, that the other duplicate, which testator had placed in his safe-deposit box where it was found after his death, was entitled to be admitted to probate.

PROCEEDINGS upon the probate of a will.

John J. Sullivan, for proponent.

COHALAN, S. A novel situation is herein presented. The testator executed in his lawyer's office a typewritten will in duplicate. The lawyer kept one of the duplicates. The testator took the other and placed it in his safe deposit box. It remained under his control until his death, was then found in his safe deposit box and is now produced.

Some few days after the execution of the will the testator, according to the testimony, called at his lawyer's office, asked for and received the other duplicate. He carried it away to place it in his safe deposit box. It was never seen again and cannot now be found.

Shall probate be granted? I am of that opinion. I find no case in this state directly in point. *Matter of Schofield*, 72 Misc. Rep. 281, presents a radically different situation; there only one of the duplicates was in the possession of the testator and that could not be

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found; here both were in the possession of the testator and one kept with the utmost care throughout the years is found.

In these cases there is of course a presumption favorable to revocation, but it is only a presumption, as is well pointed out in *Managle* v. *Parker,* 75 N. H. 139, a case in which the duplicate in the testatrix's possession was destroyed by her and yet probate was granted.

The situation now presented is vastly more favorable to probate. The duplicate now missing may have been destroyed but equally it may have been lost. Certainly the presumption that it was destroyed *animo revocandi* is of the weakest and is, I hold, in view of the care with which the other duplicate was guarded by the testator, insufficient to predicate thereupon denial of probate.

The propounded paper is therefore admitted.

Decreed accordingly.

ALBERT GARDNER, Plaintiff, *v.* PATRICK CONDON, Defendant.

(County Court, Bronx County, November, 1921.)

Jurisdiction — County Courts — residence — a general appearance waives lack of jurisdiction over defendant's person — Civil Practice Act, § 278.

A County Court may acquire jurisdiction over the person of a defendant even though he be a non-resident of the county wherein the action is brought.

A defendant in a County Court action by the service of a general notice of appearance waives his right to question the jurisdiction of the court over his person.

Where the defendant has appeared generally in the action his motion for a dismissal of the complaint under section 278 of

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the Civil Practice Act, upon the ground that it must appear upon the face of the complaint that he resides in the county in which the action is brought, will be denied, even though the complaint fails to allege that he is a resident of the county in which the action is brought.

MOTION for dismissal of complaint.

Mantinband & Krauss, for plaintiff.

Fred H. Rees, for defendant.

GIBBS, J. This is a motion for an order dismissing the complaint in this action under section 278 of the Civil Practice Act upon the ground that the court has not jurisdiction over the person of the defendant.

The action was commenced by the service of a summons and complaint. The defendant appeared by his attorney serving a notice of appearance demanding a copy of the complaint and all other papers in the action. His time to answer was extended by stipulation. Thereafter this motion was made for judgment dismissing the complaint.

The defendant contends that plaintiff has failed to allege that the defendant is a resident of the county of Bronx and that as a matter of fact he resides in Queens county. He urges that before this court can have jurisdiction over the person of the defendant it must appear upon the face of the complaint that he resides in Bronx county.

I do not agree with this contention. It is now well settled law that the County Court may acquire jurisdiction over the person of the defendant even though he be a non-resident of the county wherein the action is brought. Although jurisdiction of the subject matter of an action cannot be acquired by consent, jurisdiction over the person may be. *Meyers* v. *American*

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Locomotive Co., 201 N. Y. 163; *Levine* v. *Bordens Condensed Milk Co.*, 179 App. Div. 921; *Klein* v. *Director General, etc.*, 180 N. Y. Supp. 618.

The case at bar resolves itself, therefore, to the proposition as to whether the defendant has brought himself within the jurisdiction of this court. I believe he has. Section 237 of the Civil Practice Act provides the manner in which the defendant's appearance must be made. It provides among other things that he must appear by serving a notice of appearance. In the case before me, defendant served what is commonly called a general notice of appearance. In other words he appears generally in the action. By so doing he waives his right to question the jurisdiction of the court over his person. Had he wished to reserve that right he should have appeared specially. *Muslusky* v. *Lehigh Valley Coal Co.*, 225 N. Y. 584. In that case, Judge Pound writing for the court said at page 587: "When the summons has been served on a defendant who does not intend to submit himself to the jurisdiction of the court over his person, he may elect to remain out of court but he need not wait until the entry of judgment against him by default. He may appear specially. (*Goldey* v. *Morning News*, 156 U. S. 518; *Reed* v. *Chilson*, 142 N. Y. 152.) The special appearance is recognized only for the purpose of raising the question whether the court has obtained jurisdiction over the defendant personally or through his property. If the defendant serves a general notice of appearance, his right to assail the claim of jurisdiction over his person is waived. (Code Civ. Pro. sec. 421; *Reed* v. *Chilson, supra.*)" In the case of *Hober* v. *Reikert*, 162 N. Y. Supp. 328, it was held, that where the defendant appeared generally in an action any irregularity or lack of jurisdiction over his person was waived.

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So in the case at bar, the defendant having appeared generally, this court acquired jurisdiction over his person even though he were a resident of another county.

The motion must, therefore, be denied with ten dollars costs.

Motion denied.

ADELIAD GIOVINI, Appellant, *v.* MORRIS ARLUCK, Respondent.

(Supreme Court, Appellate Term, First Department, October Term — Filed November, 1921.)

Motions and orders — renewal of motion to vacate default judgment limited to one year from date of entry of judgment — New York City Municipal Court Code, §§ 119(2), 129.

The right given by section 119(2) of the Municipal Court Code to renew a motion to vacate a default judgment is, by section 129 of said Code, limited to the period of one year from the date of the entry of judgment.

Where a motion to open a default judgment, made within a year after the date of its entry, was never decided, a motion to renew the undecided motion, made after the expiration of said year, does not vest the Municipal Court with jurisdiction to open the default and set aside the judgment.

APPEAL by plaintiff from three orders of the Municipal Court of the city of New York, borough of Manhattan, sixth district, vacating a judgment obtained by plaintiff upon defendant's default.

Thomas A. Aurelio, for appellant.

Phillips, Jaffe & Jaffe (Harold M. Phillips, of counsel), for respondent.

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GUY, J. Plaintiff appeals from three orders entered herein; the first a short form order dated June 17, 1921, opening defendant's default and vacating the judgment entered thereon on May 4, 1920; second, a long form order entered June 21, 1921, to the same effect; third, an order entered on June 28, 1921, denying plaintiff's motion to set aside the order of June 21, 1921, on the ground that the court had no jurisdiction to make said order.

Following the entry of the default judgment on May 4, 1920, defendant moved to open the default, the return day for the hearing of said motion being July 16, 1920. On said date the court not being in session, by consent of both parties the papers were delivered to the clerk to be submitted by him to the court when in session. No decision was rendered on said motion, and it will be noted that the order of June 21, 1921, recites: "And the said motion having never thereafter been decided, and it being uncertain whether the same was ever submitted by the clerk to the court; Ordered that the said motions to open the defendant's default herein, heretofore made returnable July 16, 1920, and February 10, 1921, be, and the same hereby are renewed and reheard; that the said motion to open the defendant's default herein be, and the same hereby is granted, and the judgment heretofore entered herein by default on May 4, 1920, be, and the same hereby is vacated * * * and that upon compliance with the foregoing terms, this case be set down for trial on September 8, 1921."

The question immediately involved upon this appeal is whether the defendant having moved within a year after the entry of the default judgment to open said default, and the said motion having never been decided by the court to which it was submitted, defendant could, after the expiration of one year from

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the entry of said judgment, renew the undecided motion and vest the court with jurisdiction to open the default and set aside the judgment. Section 129 of the Municipal Court Code provides: "A motion to open a default and to vacate and set aside a judgment entered thereon must be made with due diligence and upon good cause shown and in no event more than one year after entry of the judgment; * * *."

The contention of the defendant that having made the original motion returnable July 16, 1920, with due diligence, and the said motion having been submitted to the court and remaining undecided, he could renew the same and bring it up for argument after the expiration of one year, is without merit. The language of the statute is unequivocal, and in no event can the court entertain such a motion. The right of renewal given by the Municipal Court Code, section 119, subdivision 2, is limited by section 129 to the period of one year from the date of entry of judgment.

Order of June 28, 1921, denying plaintiff's motion to vacate the orders of June 17 and 21, 1921, reversed, with ten dollars costs, and motion granted, with ten dollars costs; and appeals from orders of June 17 and 21, 1921, dismissed.

BIJUR and WAGNER, JJ., concur.

Order reversed and motion granted, with costs.

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BANK OF NEW YORK, N. B. A., Respondent, *v.* THOMAS W. SIMMONS & COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, October Term — Filed November, 1921.)

Banks and banking — money had and received — mistake — bills of exchange — burden of proof.

Prima facie, money paid by mistake to one entitled thereto may be recovered back even though the mistake was due to the negligence of the one making the payment.

If, however, in such case, the defendant by reason of the mistake has changed its position to its detriment so that the parties cannot be placed in *statu quo,* there can be no recovery, and the burden of proof of showing that its position has been so changed rests upon the defendant.

The plaintiff, having received from defendant certain drafts for collection in Rio de Janeiro with instructions to pay therefrom a certain amount to a certain person in that city, the Rio bank as correspondent of plaintiff transmitted to it the full amount of the drafts and sent a charge slip to represent the money paid to the designated person in Rio de Janeiro. Through an error in plaintiff's bookkeeping department the charge slip was either overlooked or not connected with the transaction, with result that plaintiff transmitted the full amount of the drafts without making any reference to the payment to the person in Rio de Janeiro, who sometime thereafter called upon defendant in the city of New York, and upon being asked whether he had been paid said money replied that he had not, whereupon defendant paid it to him. Later plaintiff discovered its mistake and demanded repayment from defendant. When upon the trial of an action for money had and received defendant offered to prove that the person in Rio de Janeiro had gone away and that it could not collect from him, the court at the instance of plaintiff's counsel excluded that "entire line" of questioning to which the defendant duly excepted. *Held,* that the exclusion of the testimony was error for which a judgment entered in favor of plaintiff on the verdict will be reversed and a new trial ordered.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiff, after a trial by a judge and jury.

Alley, Lee & Voorhees (Caruthers Ewing, of counsel), for appellant.

Satterlee, Canfield & Stone (R. Randolph Hicks, Arthur B. Smith and James Adikes, of counsel), for respondent.

BIJUR, J. This is an action for money had and received. The facts are in substance as follows:

Plaintiff had received from defendants certain drafts for collection in Rio de Janeiro with instruction upon collection to pay approximately $780 to Aguas & Co. in that city. Plaintiff commissioned its Rio de Janeiro correspondent to perform the services. The Rio bank transmitted to plaintiff the full amount of the drafts and sent a charge slip to represent the money paid to Aguas. Through an error in the plaintiff's bookkeeping department the charge slip concerning the payment to Aguas was overlooked or not connected with the transaction with the result that plaintiff transmitted the full amount of the drafts to defendant without making any reference to the payment of $780 to Aguas & Co. Sometime thereafter Aguas called upon defendant in New York and upon being asked whether he had been paid the $780 said that he had not; whereupon defendant paid him that sum. Later the plaintiff discovered its mistake and demanded from defendant the repayment of the $780.

The recovery in cases of this kind is based upon the familiar doctrine of unjust enrichment of the defendant. *Prima facie* there is no doubt that money paid by mistake to one entitled thereto may be recovered

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back by the payor even though the mistake was due to the negligence of the payor.

If, however, in a case of that kind the defendant has by reason of the mistake changed its position to its detriment so that the parties cannot be placed in *statu quo* a recovery will not be allowed, on patent equitable considerations. The doctrine and the exception have been repeatedly reasserted, and the error of plaintiff arises from failure to recognize the difference between cases where both parties are at fault and this, in which the mistake is due exclusively to the negligence of the plaintiff. See Keener Quasi-Contracts, 71 *et seq.* The burden of showing that his position has been changed to his detriment lies upon the defendant. *Mayer* v. *Mayor,* 63 N. Y. 455; *Walker* v. *Conant,* 65 Mich. 194. If these principles and the concomitant distinctions be borne in mind, the leading New York cases will be found to be consistent. *Kingston Bank* v. *Eltinge,* 40 N. Y. 391; *Union National Bank of Troy* v. *Sixth National Bank,* 43 id. 452; *Corn Exchange Bank* v. *Nassau Bank,* 91 id. 74; *Hathaway* v. *Co. of Del.,* 185 id. 368.

Respondent contends in substance that the insolvency of the second payee so that the first payee is unable to collect back the last payment (in this case the payment from defendant to Aguas) is not a sufficient defense, and cites as authority the *Union Bank Case,* 43 N. Y. 452, italicising the bare statement that Cregan, the second payee there, thereafter died insolvent. He fails to note, however, that the court laid stress and based its decision in favor of plaintiff, upon the fact that after the defendant in that case had been apprised that the payment to it was a mistake, Cregan remained perfectly solvent for a sufficient time to have enabled a re-collection of the money from him.

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Plaintiff further urges that there was no proof by the defendant that its position had become irrevocably changed in that it could not collect from Aguas & Co. When, however, defendant undertook to prove, as his counsel put it, " that the man [Aguas] had gone away and that they could not collect from him," the court at the instance of plaintiff's counsel, excluded that " entire line " of questioning to which the defendant excepted. The testimony, however, was not only material but absolutely essential to defendant's defense, and for the error of its exclusion the judgment must be reversed and a new trial granted, with thirty dollars costs to appellant to abide the event.

GUY and WAGNER, JJ., concur.

Judgment reversed.

LUDWIG VON ROEDER, Appellant, *v.* PAUL A. MILLER, Respondent.

(Supreme Court, Appellate Term, First Department, October Term — Filed November, 1921.)

Parent and child — liability of parent for necessaries — separation agreement not a defense to recovery for medical attendance to infant child — Penal Law, § 482(1).

Both at common law and under section 482(1) of the Penal Law a father is liable for necessaries furnished to his infant child.

In case the parent neglects his duty in that regard any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law implies a promise on his part to pay.

A separation agreement binds only the parties thereto, and is not a defense to an action brought against the husband to recover the reasonable value of necessary medical attendance rendered to his infant child, though the plaintiff was aware

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that defendant and his wife were living separately and apart under agreement, and a judgment dismissing the complaint upon the merits will be reversed, and judgment ordered in favor of the plaintiff for the full amount claimed, with costs.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, dismissing the complaint upon the merits.

Samuel D. Lasky, for appellant.

Omri F. Hibbard (David Leavenworth, of counsel), for respondent.

WAGNER, J. The action was brought by the plaintiff, a physician, to recover of defendant, the father of a minor, the reasonable value of his services rendered to defendant's child. The defendant, admitting the rendition of the services and their reasonable value, set up as a defense a separation agreement between the defendant and the mother of the child, and his due observance of its terms, and contended by reason of said agreement and his compliance therewith the plaintiff was not entitled to a recovery.

The case was submitted to the trial justice upon an agreed statement of facts, namely: that the services were necessary, and the amount sued for the reasonable value thereof; that the defendant and his wife were living separately and apart under agreement; that the plaintiff knew they were so living apart, but had no knowledge of the agreement's terms and stipulations; and that the defendant paid regularly the installment for support and maintenance therein provided.

From a judgment in favor of the defendant dismissing the complaint upon the merits, the plaintiff has appealed. That the liability of the father for the

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furnishing of necessaries to an infant child is a primary one, is well settled. *Cromwell* v. *Benjamin*, 41 Barb. 558; *People* v. *Rubens*, 92 N. Y. Supp. 121. Not alone was the obligation existent at common law, but it has found concrete expression in the statutes of this state. Penal Law, § 482, subd. 1. The obligation is a natural one and if the parent neglects the duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the implied promise is raised in law to pay on the parent's part. *DeBrauwere* v. *DeBrauwere*, 203 N. Y. 460; *Van Valkinburgh* v. *Watson*, 13 Johns. 480.

We think it undoubted that under no circumstances can such a parent by mere agreement with a third person (in this case the mother perforce a separation agreement) discharge his liability for the primary obligation to supply necessaries to his infant children fixed by the law. The separation agreement itself may be valid and not in conflict with the provisions of the Domestic Relations Law forbidding a husband relieving himself from his liability to support his wife. *Carling* v. *Carling*, 42 Misc. Rep. 492; *Reardon* v. *Woerner*, 111 App. Div. 259; *Winter* v. *Winter*, 191 N. Y. 462. But its effect as to limitation of liability ends with the person whose consent gave it validity. The agreement itself is binding only upon those whose volition and execution gave it birth. In nowise can it diminish the liability of the parent to infant children who were not and could not become parties thereto. By contracting with his wife he was unable to discharge his own obligation to his child. That remained unimpaired notwithstanding the wife's consent to accept a stated sum in lieu of periodical payments or a fixed sum payable in instalments. *Michaels* v. *Flach*, 189 N. Y. Supp. 908; *Plaster* v. *Plaster*, 47 Ill. 290.

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It is true, as counsel urges from the line of cases of which *Raymond* v. *Cowdrey*, 19 Misc. Rep. 34, and *Bloomingdale* v. *Brinckerhoff*, 2 id. 49, are types, that the presumption that the wife is authorized to pledge the husband's credit ceases where they are living apart, but in each of those cases the articles furnished were for the use of the wife and the question of liability turned on whether the husband had provided adequate means for her support and no question of liability for necessaries furnished to infant children was involved.

The judgment of the court below is reversed, with thirty dollars costs, and judgment is ordered for the plaintiff, with costs.

GUY and BIJUR, JJ., concur.

Judgment reversed.

CHARLES EISENBERG et al., Plaintiffs, *v.* ANTHONY SPACHMANN, Defendant.

(Supreme Court, Erie Special Term for Trial of Equity Causes, November, 1921.)

Contracts — specific performance of land contract — Statute of Frauds.

Where only a part of the terms of a contemplated contract is agreed upon with intention that others are to be left for negotiation, there is no meeting of the minds of the parties.

Where all the terms having been agreed upon, nothing remains but to reduce the agreement to writing, the minds of the parties have met even though the formal contract is never executed.

In an action to compel specific performance of a land contract it appeared that the parties having agreed upon the purchase and sale of the premises, then and there signed a writing embodying all the terms of their contract. *Held*, that the writing being sufficient within the Statute of Frauds, was enforcible.

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The fact that the day after signing the writing, upon the suggestion of defendant's daughter that a contract to sell land must be drawn by a lawyer or a notary public, the parties went to the office of defendant's lawyer who dictated certain additional clauses which though advisable were not in the minds of the parties when they signed the writing, did not affect its validity.

Where defendant upon tendering back to the plaintiff a cash payment made at the signing of the contract, declared the transaction at an end, specific performance of the contract will be decreed.

ACTION for specific performance of a contract for the sale of land.

Jacob Sickerman, for plaintiffs.

Ernest F. Kruse and Fred W. Plato, for defendant.

SEARS, J. The evidence establishes that on the evening of Sunday, March 27, 1921, the plaintiffs, with another person, called at the house of the defendant and had a conversation with him. The defendant was suffering from sciatica, but this did not interfere with his mental powers, or his perfect recollection, upon the trial, of the transactions of that evening. Besides those mentioned, the defendant's daughter, a young woman, was present. The plaintiffs entered into a negotiation with the defendant for the purchase of certain real property which he owned, and, during the negotiation, twice increased the amount of their proposed purchase price, upon the defendant's stating that the amount then suggested was not enough. During the entire conversation, the defendant's daughter urged her father not to sell the property. Despite the urging of the daughter, however, plaintiffs and defendant agreed upon the purchase and sale of the premises, and the man who had accompanied

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the plaintiffs, who proved to be a law student, prepared a written instrument which the plaintiffs and defendant signed, which is as follows:

"This is an agreement between Anthony Spachmann, the party of the first part, and Charles Eisenberg and Reuben Eisenberg, the parties of the second part. The party of the first part is to convey the title in the premises known as 1589 Genesee Street for the sum of eight thousand dollars ($8000); twenty-eight hundred dollars ($2800) to be paid when title is transferred on or about April 15, 1921, or when search (title search) is searched or completed; fifty dollars ($50) is given as a deposit and a mortgage of fifty-one hundred and fifty dollars ($5150) is held by Mrs. F. Cortes, which is to be paid by party of second part if Mrs. Cortes is unwilling to continue as mortgagee. Party of the first part to remain one month free after transfer.

"Party of first part ANTHONY SPACHMANN.
"Party of second part C. EISENBERG.
REUBEN EISENBERG."

The plaintiffs, at the time of signing, paid to the defendant the sum of fifty dollars. Before, or at the time, the instrument was signed, the defendant's daughter said that a contract to sell land must be made before a lawyer or a notary public, and the parties agreed to go to the defendant's counsel's office on the following day to execute a further land contract, to be drawn, presumably, by defendant's counsel. On the next day, the parties went to the office of defendant's counsel, and counsel dictated to his stenographer certain clauses, including a clause in respect to the adjustment of rents, interest, insurance and taxes as of the day of the transfer of possession, a provision in respect to the tenancy in part of

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the premises of a person who was a tenant by the month, and a provision was discussed in relation to a survey. The defendant, thereupon, refused to deliver a survey, and the parties left the office to meet again the following Wednesday. At the meeting on Wednesday, the defendant tendered back to the plaintiffs the fifty dollars which had been paid by plaintiffs to the defendant on the Sunday previous, and declared the transaction at an end.

This action is brought for the specific performance of the contract which the plaintiffs claim was embodied in the instrument signed on Sunday night, and quoted above. It is the contention of the defendant that the minds of the parties never met; that there was never any completed contract, but that the whole matter, including the writing quoted above was but a part of a negotiation which was to culminate in a formal instrument to be drafted by counsel the following day.

It is well established that if only a part of the terms of a transaction is agreed upon and others are intended to be left for subsequent negotiation, there is no meeting of the minds. *Brown* v. *N. Y. Central R. Co.*, 44 N. Y. 79; *Spielvogel* v. *Veit*, 197 App. Div. 804; 1 Williston Cont., § 28.

It is also equally well settled that where all the terms are agreed upon, and nothing remains but the formal reduction of the agreement to writing, or to a more formal writing, the minds have met, even though the formal contract is never, thereafter, executed. *Sanders* v. *Pottlitzer Bros. Fruit Co*, 144 N. Y. 209; *Pelletreau* v. *Brennan*, 113 App. Div. 806; *Disken* v. *Herter*, 73 id. 453; affd., 175 N. Y. 480. In which one of these classes does this case fall?

In the evidence of the negotiations on Sunday night nothing was stated to be left for future determina-

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tion. The reason given for going to the defendant's counsel was that a contract might be executed which would be legally binding, and the contract which was to be executed according to the undertaking of the parties was the contract which had been agreed upon in defendant's house. Certain additional clauses were, perhaps, advisable, but they were not in the minds of any of the parties on Sunday night, nor does it seem that any of the parties deemed that anything except what they had agreed upon was essential. The defendant's daughter was, of course, mistaken in believing that such a contract must be executed before a notary public or a lawyer, but that does not affect the validity of the instrument which was drawn. The writing embodies all the terms of the contract. It is sufficient within the statute of frauds, and is enforcible in this action. The full description of defendant's property is contained in the complaint, and admitted by the answer. *Pelletreau* v. *Brennan, supra; Waring* v. *Ayres,* 40 N. Y. 357.

A decision directing judgment for specific performance will be signed.

Judgment accordingly.

LEONARD WINDHEIM, Respondent, *v.* LAFAYETTE HOTEL COMPANY, Defendant, and VAN DYKE BLACK AND WHITE TAXI COMPANY, Appellant.

(Supreme Court, Erie Special Term, November, 1921.)

Depositions — City Court of Buffalo — parties — Laws of 1909, chap. 570, § 56 (as amended by Laws of 1915, chap. 188), § 115 — Code Civ. Pro. § 2980.

Statutory provisions relating to the taking of depositions of witnesses, in the absence of specific provision to the contrary, are applicable to all witnesses whether they are parties to the action or not.

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Section 56 of the statute establishing the City Court of Buffalo (Laws of 1909, chap. 570, as amended by Laws of 1915, chap. 188) relates to practice and the regulations thereof and must be read in connection with section 115 of said statute, which relates to jurisdiction.

The Code provisions relating to the taking of depositions in Justices' Courts making no distinction between witnesses who are parties and other witnesses, and the jurisdiction of courts of justices of the peace and of said justices having been specifically granted to the City Court of Buffalo, by section 115 of the statute creating said court, a party to an action in said court is a witness within the meaning of said section.

An order granted in an action brought in the City Court of Buffalo, under section 2980 of the Code of Civil Procedure relating to the taking of depositions for use in Justices' Courts, made applicable by section 115 of the statute creating said court, directing that a commission issue to take the deposition of the plaintiff, a resident of Brooklyn, N. Y., as a material witness, will be affirmed.

APPEAL by defendant from order of City Court of Buffalo directing the issuance of a commission on behalf of plaintiff to take plaintiff's deposition as a material witness.

J. Francis Harter, for plaintiff.

Franklin R. Brown, for Van Dyke Black and White Taxi Company.

SEARS, J. This is an appeal by the defendant, Van Dyke Black and White Taxi Company, from an order of the City Court of Buffalo, directing the issuance of a commission at the instance of the plaintiff to take the deposition of the plaintiff as a material witness, residing at Brooklyn, N. Y., under section 2980 of the Code of Civil Procedure. The appellant bases its contention on the provision of section 56 of the act establishing the City Court of Buffalo, being chapter 570 of the Laws of 1909, as amended by chapter 188 of the Laws of 1915, which reads as follows: "The

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provisions of the code of civil procedure and rules and regulations of the supreme court as they may be from time to time, shall apply to the city court of Buffalo as far as the same can be made applicable and are not in conflict with the provisions of this act; in case of such conflict this act shall govern."

Under the quoted provision the appellant contends that section 870 and the following sections of the Code of Civil Procedure, in relation to the taking of the deposition of a party, are applicable to actions and proceedings in the City Court, and that, as the conditions of such Code sections were not met, the order was erroneously granted. The respondent, on the other hand, contends that this commission was duly ordered under section 2980 of the Code of Civil Procedure, relating to the taking of depositions of witnesses for use in Justices' Courts, made applicable to the City Court of Buffalo by section 115 of the act, to establish the City Court of Buffalo, reading: "In addition to the jurisdiction hereinbefore specifically conferred upon the city court of Buffalo, the said court and the judges thereof shall have all the jurisdiction heretofore vested in and possessed by the municipal court of Buffalo, the police court, *the courts of the justices of the peace, or the judges and justices thereof, except as herein otherwise expressly provided.*"

Section 56 relates to practice and practice regulations. Section 115 relates to jurisdiction. The question then sharply arises whether the provisions in relation to taking depositions relate to practice or jurisdiction. The Code of Civil Procedure and the present Civil Practice Act permit discovery and the taking of depositions by a proceeding in an action, although some of the rights thus enforced were formerly enforced in independent actions, and while now,

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in a great majority of cases, the relief is subsidiary to the main relief sought, it is a fair construction to rule that all such matters relate to jurisdiction, rather than practice. Authority is not wanting for this view. In *Becker* v. *Schully,* a similar appeal came before the Special Term in this county. There the order which had been granted by the City Court directed an inspection of personal property of the plaintiff at the instance of the defendant. Mr. Justice Laing, in an opinion which has not been published, said: " Section 56 must be read with these provisions in mind (the jurisdictional provisions of the City Court Act, itself). They preclude the idea that additional jurisdiction is to be inferred from language like that used in section 56. The authority conferred by sections 803 to 809 of the Code is important and its exercise is there hedged about by various restrictions. These sections constitute the whole of an article of the Code. That article cannot be transferred to the City Court Act by language like that used in section 56. There is ample scope for the operation of the words there found without applying them to sections 803 to 809 of the Code. The better construction of section 56 is that it was not intended to confer additional jurisdiction either as to actions and proceedings, or as to proceedings in actions, but to matters of practice in actions and proceedings, and proceedings in actions, jurisdiction of which is specifically conferred by other sections of the City Court Act."

A similar question arose under the Municipal Court Code of New York city in *Mitchell* v. *Schroeder,* 94 Misc. Rep. 270; affd., 174 App. Div. 857, on the opinion below. Mr. Justice Lehman, in the course of the opinion, said: " It seems to me that the only reasonable construction of the Municipal Court Code is that the legislature intended to give to the Municipal Court

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no powers not expressed or by fair implication given by said Code, and that only those sections of the Code of Civil Procedure are applicable to the Municipal Court which fall within the language of section 15 of the Municipal Court Code, *i. e.*, those sections of the Code of Civil Procedure which cover matters of practice, pleadings, forms and procedure in the exercise of the powers otherwise expressly or impliedly granted to the Municipal Court. The only question that remains is whether an order of examination is such a matter of practice or procedure. * * * The right to an order of examination, I think, cannot strictly be considered as a matter of practice or procedure in an action; it is a right given to a party in the action by statute, and, though the order is obtained in the action and not in a special proceeding, yet that order can be made only by virtue of the power conferred by statute, and is not merely a matter of practice or procedure of the court in the action. In other words section 873 of the Code of Civil Procedure does not regulate or alter or determine the practice or procedure of the court but confers a new power upon a judge of the court." See to the same effect *Scheidlinger* v. *Silber,* 174 App. Div. 887.

The jurisdiction of the courts of justices of the peace and of the justices of that court being specifically granted to the City Court of Buffalo by section 115 of the City Court Act quoted above a further question arises, namely, whether a party is a witness within the meaning of that section. In the provisions relating to the taking of depositions in Justices' Courts, there is no distinction between witnesses who are parties and other witnesses. The rule abrogating the ancient common law and permitting a party to be sworn as a witness (see Code Civ. Pro.

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§ 828) is now firmly established in our jurisprudence. In the absence of specific provisions in relation to the taking of depositions of parties, sections relating to the taking of depositions of witnesses are obviously applicable to all witnesses, whether parties or not parties. *Murphy* v. *Sullivan*, 77 N. Y. Supp. 950.

The order appealed from is affirmed, with ten dollars costs.

Order affirmed, with costs.

GIACOMO SICCARDI, Plaintiff, *v.* MICHELE AJELLO et al., Defendants.

(Supreme Court, Kings Special Term, November, 1921.)

Process — jurisdiction — when omission of certain words in summons not a jurisdictional defect — Civil Practice Act, § 105 — Rules of Civil Practice, rule 45.

Under the liberal provisions of section 105 of the Civil Practice Act, the defect in a summons, which does not follow the form prescribed by rule 45 of the Rules of Civil Practice, is not jurisdictional.

Where with a summons omitting the words "or, if the complaint is not served with the summons, to serve a notice of appearance," a complaint was actually served, such omission is not prejudicial and a motion by defendant, appearing specially, for judgment dismissing the complaint on the ground that the court had not jurisdiction over the person of the defendant, will be denied.

A party may not in the same motion challenge the jurisdiction of the court over his person and also ask for judgment on the pleadings because of the insufficiency of the complaint.

The power of the court to relieve against default extends only to default suffered in judicial proceedings before the court.

MOTION to dismiss complaint upon the pleadings under rule 106 of the Rules of Civil Practice.

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Brower, Brower & Brower, for plaintiff.

John D. Armstrong, for defendant Temple Adath Israel of Coney Island.

BENEDICT, J. This is a motion by defendant Temple Adath Israel of Coney Island, appearing specially, "for judgment dismissing the complaint upon the pleadings, under Rule 106, Rules of Civil Practice upon the ground: 1. That the Court has not jurisdiction of the person of the defendant. 2. That the complaint does not state facts sufficient to constitute a cause of action; and for an order allowing the defendant herein named Temple Adath Israel of Coney Island, to pay into Court, if the same be refused by plaintiff the interest now overdue as alleged in the complaint of the plaintiff, either with or without interest on such interest, and either with or without costs and disbursements to date in the above entitled action; upon such payment the defendant Temple Adath Israel of Coney Island to be relieved of any default heretofore occurring, and for such other and further relief as to the Court may seem just."

It is evident that the moving party has misconceived the practice. It cannot in the same motion challenge the jurisdiction of the court over its person and also ask for judgment on the pleadings because of the insufficiency of the complaint; for to interpose its objection to the jurisdiction, it must appear specially, but it is not in a position to challenge the sufficiency of the complaint until it has appeared generally. See *Thorburn* v. *Gates*, 184 App. Div. 443, 444.

The notice of motion fails to specify the ground or grounds upon which it is claimed that plaintiff has failed to acquire jurisdiction of the moving defendant. I suppose it is because the summons follows the form prescribed by the late, lamented by some, Code

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of Civil Procedure, rather than that prescribed by rule 45 of the Rules of Civil Practice. It is true that the summons is defective, but the defect is not, in my opinion, jurisdictional under the liberal provisions as to amendments and the disregard of errors contained in section 105 of the Civil Practice Act, whatever may have been the former rule on this subject. The complaint was actually served with the summons so that the omission from the summons of the words " or, if the complaint is not served with this summons, to serve a notice of appearance," which appear in the prescribed form, cannot, as I have repeatedly had occasion to say, have prejudiced the moving defendant. If the complaint had not accompanied the summons I should have to hold differently.

I think that the complaint is defective in not duly alleging the service of notice and demand for payment of interest, so as to justify plaintiff in declaring the principal due; but for reasons already stated the moving defendant cannot avail itself of this defect on this motion.

As to the said defendant's motion for leave to pay the interest into court and be relieved of its default, I know of no such practice. The power of the court to relieve against defaults extends only to defaults suffered in judicial proceedings before the court, and it cannot in summary fashion or otherwise deprive a party of a right acquired under a contract.

Motion denied, without costs.

Since the publication of the foregoing in the New York Law Journal of November 19, 1921, my attention has been called to the decision of Mr. Justice Taylor in *Kenngott* v. *Kenngott,* 116 Misc. Rep. 569, in which he reaches the conclusion that a summons so

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defective is void, and that service thereof should be set aside. I am unable to concur in his view. I was a member of the convention which framed the present Rules of Civil Practice, and as it happened I suggested the change in the form of summons which appears in rule 45. That change was adopted because the old form of summons, as prescribed by section 418 of the Code of Civil Procedure, did not correctly state what the defendant was required to do. It in terms required him to answer within twenty days after the service of the summons whether the complaint was served therewith or not, whereas by other sections of the Code, if the complaint were not served with the summons, the defendant need only serve a notice of appearance and demand a copy of the complaint within that time, and was not required to answer until twenty days after the service of the complaint. The new form of summons corrects this defect in the old form. If, under the present practice, the complaint be not served with the summons, the omission of the words above quoted might be prejudicial to the defendant. But where the complaint is served with the summons, it is too plain for argument that the defendant cannot be prejudiced by the omission.

It was clearly the intent of the Civil Practice Act and the Civil Practice Rules to eliminate from our practice, as far as possible, objections based upon merely technical grounds, where the substantial rights of the objecting party were not adversely affected. To this end it was provided in section 105 of the Civil Practice Act, that "At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the court, with or without terms, or, if a substantial right of any party shall not be thereby prejudiced, such mistake, omis-

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sion, irregularity or defect must be disregarded." The same general intent is evidenced by the other sections of article 9 of said act, and by rule 166 of the Rules of Civil Practice. It is the duty of the courts to carry out these provisions and apply them in a spirit of liberality. This will tend strongly to promote the ends of justice and remove the stigma which, in the minds of laymen, is attached to our procedural law, that it operates to delay or defeat justice by technical rules.

Precedents based upon the Code of Civil Procedure or earlier practice acts are no longer controlling, because section 105 of the Civil Practice Act is a new section, differing in its language from section 723 of the late Code. But even under the former Code, there are cases where defects quite as serious as that in the present summons have been held not to be jurisdictional. *Gribbon* v. *Freel,* 93 N. Y. 93, 96; *Wohlfrath* v. *National Export Assn.,* 57 Misc. Rep. 137; *Sullivan* v. *Harney,* 53 id. 249; *Spruhn* v. *Brown,* 63 id. 46; *Sears* v. *Sears,* 9 Civ. Pro. R. 432; *Wiggins* v. *Richmond,* 58 How. Pr. 376. In *Gribbon* v. *Freel, supra,* a mistake in making a summons in an action in the Marine Court of the city of New York against a nonresident of the state returnable in six days instead of ten was held an irregularity merely, and amendable under section 723 of the Code of Civil Procedure. To the same effect is *Spruhn* v. *Brown, supra,* where a summons in an action in the City Court of the city of New York was made returnable in two days instead of six. In *Sullivan* v. *Harney, supra,* the omission of the street number of the office of plaintiff's attorney required by section 417 of the Code was held not to be jurisdictional.

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ELIZABETH M. ROSENWASSER, Plaintiff, *v.* PHILIP ROSENWASSER, Defendant.

(Supreme Court, Kings Special Term, November, 1921.)

Husband and wife — separation — alimony — security — modification of judgment — Civil Practice Act, § 1170.

Where the defendant in a separation action is unsuccessful and the referee to take proof of the financial resources of the defendant and to report to the court the amount necessary to be allowed for the support of the plaintiff and the three minor children, issue of the marriage, recommends allowances which upon the evidence seem to be suitable and just to both parties to the action, the court upon motion to confirm the referee's report will substantially adopt his findings.

Where the referee upon making a finding that the present income of the defendant is from $17,000 to $20,000 per annum, recommends a yearly allowance of $8,400 for the support of the wife and children, and it appears that the defendant was a man of considerable means and of good standing in the business community, the court will not presently require him to give security for his obedience to the directions which the court may give in respect to the payment of allowances, as upon it being made to appear that defendant's income has materially increased, the judgment, upon leave granted, may be modified in the manner provided by section 1170 of the Civil Practice Act.

Where defendant expresses his willingness to permit the plaintiff and her children to continue in the occupancy of his house where they are now residing until it was sold, he should not be obliged to pay a stated sum a year rent in lieu of such occupancy as recommended by the referee.

ACTION for separation. On motion to confirm report of referee.

Samuel L. Chess and Robert H. Ernest, for plaintiff.

Leon M. Prince and Sidney J. Loeb, for defendant.

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BENEDICT, J. This cause is now before me on the settlement of the judgment. On the trial last June a decision was made by the court, with the practical consent of the defendant and on disputed evidence, awarding a decree of separation in favor of the wife, and ordering a reference to I. Maurice Wormser, as referee, to take proof as to the question of the defendant's financial resources, and also to report to the court what amount is necessary to be allowed for the support of the plaintiff and the three minor children, the issue of the marriage.

It was impossible for the court on the trial to gain any satisfactory idea as to the resources and income of the defendant on which to base intelligent action. The parties appeared before the referee, and after several months spent in a very painstaking investigation of the matter the referee has reached a conclusion which seems substantially correct. He was confronted on the plaintiff's side with extravagant claims as to the defendant's wealth and as to her and her daughters' requirements. On the other hand, the defendant apparently attempted to conceal his real financial position. The referee has recommended allowances which, on the evidence referred to in his report, seem to be suitable and just to both parties. He has discharged a very difficult duty with discretion and ability, and I am disposed on his report and the elaborate briefs submitted by both counsel to adopt his findings in substance.

The referee began his hearings on June thirteenth, and continued them at intervals until September 28, 1921. He has submitted an exhaustive report, accompanied by eleven hundred pages of minutes of the hearings before him. Much time was necessarily occupied on the reference in the effort to get at the truth concerning the resources of the defendant. Two expert

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accountants were employed, one by each party, who reached results, as shown by their reports, more than $114,000 apart as to resources. The plaintiff's expert showed that the defendant's income had averaged yearly from 1916 to 1920 almost $50,000. The referee, however, only found that it was during that period "well in excess of $25,000," and that his present income is from $17,000 to $20,000 per annum.

On all the evidence before him the learned referee recommended a yearly allowance of $8,400 for the support of the wife and the three daughters of the marriage. This was arrived at as follows, viz., for rent of an apartment, in case the plaintiff is not permitted to continue to occupy the defendant's residence with her children, $1,500. For the support of the plaintiff, $2,500; for the support of the eldest daughter, who is sickly, $2,000, and for the support of each of the two younger daughters, $1,200 a year. Both parties have expressed some dissatisfaction with these recommendations and have submitted quite elaborate briefs in support of their respective positions.

As to the plaintiff's claim that the allowance of the sum recommended by the referee is inadequate, I do not agree. I shall not now adopt her suggestion that the defendant be required to give security for his obedience to the directions which the court shall give in respect of the payments to be ordered. I will not anticipate a failure or refusal on the defendant's part to comply with the judgment. He is a man of considerable property and of good standing in the business community. If in the future his business shall improve so that his income will be materially increased, the judgment may be modified in the manner provided in section 1170 of the Civil Practice Act, after leave granted. This is as far as I am, as at present advised, inclined to go.

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The learned counsel for the defendant does not very seriously object to the sums which the referee has recommended for the support of the plaintiff and her children, but he strongly objects to those amounts being increased as the plaintiff requests. The court does not understand, as defendant's counsel assumes, that if it should conclude not to adopt the recommendations as made it would be incumbent on it to examine the entire testimony and the exhibits anew in order to see whether the facts found by the referee were supported by the evidence. I will, however, assume that they are and shall adopt them as the basis for fixing the amount which should be allowed. I shall award the sum of $2,500 yearly to the plaintiff for her own support, beginning as of June 6, 1921, the date when the cause was heard and decided in plaintiff's favor. See *McCarthy* v. *McCarthy,* 143 N. Y. 235, 240. I shall award for the maintenance of the daughter Ruth, seventeen years of age, the sum of $2,000 yearly, payable to her mother for the daughter's support and education, beginning as of the date of the judgment herein and continuing until she attains her majority. I shall award for the maintenance of each of the daughters, Henrietta, fifteen years of age, and Rose, eleven years of age, the sum of $1,200 yearly, payable to their mother for their support and education, beginning as of the date of the judgment and continuing until they respectively attain their majorities. These payments will be made in monthly installments, except that those already accrued will be made in one sum, payable in ten days after entry of the judgment. No alimony *pendente lite* has been allowed in the present case, and I do not understand that the defendant has given the plaintiff any money or furnished her with any clothing since the fall of 1919, although he has paid the household expenses and clothed the children.

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In regard to the house wherein the plaintiff and her children are residing, the defendant, who owns the property, submits that he should not be obliged to pay the sum of $1,500 a year rent in lieu thereof as recommended by the referee, because he expresses a willingness to permit them to continue occupying the house until it is sold. In this view I concur, and the decree will provide that until the defendant shall sell the house the plaintiff and the children may continue to reside therein and enjoy the use of the furniture without charge, and that the defendant will pay the carrying charges thereon; that if he shall find a purchaser for the house at a suitable price he shall be at liberty on thirty days' notice to the plaintiff to sell the property and that the plaintiff shall join in the deed thereto, proper provision being made for the protection of her inchoate right of dower in the property or for the payment to her of a gross sum in lieu of dower to be computed according to the principles laid down in rule 243 of the Rules of Civil Practice. The judgment will further provide that on and after the date when the plaintiff leaves the house, in the event that a sale is made, the defendant shall also pay to the plaintiff in advance the monthly sum of $125 for rent of another place, where she and her children can reside, and also that he shall allow her either to take away from the house and use all the furniture therein (except such articles of furniture as are purely personal to and are required by the defendant for his own use), or in lieu thereof that he shall allow her to purchase at his expense new furniture for the use of herself and their daughters. The judgment shall contain apt words giving the right to either party to apply to the court at the foot of the judgment for further particular directions for the settlement of any dispute arising thereunder, but limited to effectuating the

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intent of the court as herein and in the decree expressed. The judgment will contain provisions in accordance with the referee's report concerning the right of the defendant to see his daughters, and, so long as he complies with the provisions therein contained, to have temporary custody of them on Sundays and holidays and at such other reasonable times as may be set forth in the judgment. Costs to be taxed are allowed to the plaintiff.

Judgment accordingly.

KOPPEL GOTTLIEB, Plaintiff, *v.* "HENRY" MATCKIN (First Name Fictitious), President, and HARRY BLOOMFIELD, Secretary of Retail Grocery and Dairy Clerks' Union of Greater New York, Defendants.

(Supreme Court, New York Special Term, November, 1921.)

Injunction — public health — delivery of milk cannot be subservient to controversy concerning wages.

The health of an entire community must not be made subservient to the right or wrong of a controversy concerning wages.

Any organized effort to interfere with the uninterrupted delivery of the milk supply to the people of the city of New York is an act of hostility to the public weal and will be enjoined.

MOTION for injunction.

Lesser & Lesser, for plaintiff.

No appearance for defendants.

GUY, J. Uninterrupted delivery of the milk supply to the people of this city is so vital for the

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preservation of the general health of the community, and especially children and invalids, that any organized effort to interfere therewith must be regarded as an act of hostility to the public weal and such an unlawful purpose as calls for the exercise of the full authority of the courts and police authorities. Whatever may be the right or wrong of the present wage controversy, the health of this entire community cannot be made subservient thereto. Picketing and other acts alleged against the defendants have been held not to be unlawful under ordinary conditions, but when linked with a purpose inimical to the welfare of the community they become unlawful. This court would hesitate in an ordinary wage dispute to grant the relief asked for herein, but feels that it is its duty to assert the full power of the court under the circumstances to protect the lives and health of the people of New York. The motion to restrain the defendants is therefore granted, with notice to the defendants that any disobedience of the order herein will be visited with the fullest measure of punishment within the power of this court.

Motion granted.

THE GENEVA NATIONAL BANK, Plaintiff, *v.* RAYMOND J. FOX and JOE DE ROSA, Defendants.

(Supreme Court, Ontario County, November, 1921.)

Banks and banking — stopping payment of check — holder in due course may recover.

The holder of a check acquired in due course and for value is entitled to recover against the maker, even though the instrument was diverted through the fraudulent acts of the payee.

The day after one of the defendants had made his check for $250 to the order of the other defendant in payment of certain

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shares of stock to be delivered, the maker told the payee that he did not want to buy the stock. A few days later the payee presented the check to plaintiff, receiving $205 in cash, the balance being deposited to his account, bringing the same up to $80.23, and on the same day he withdrew $80. In the meantime, the maker had stopped payment of the check and on its presentment in the due course of business at the bank upon which it was drawn, payment was refused and the check went to protest. In an action on the check it appeared that plaintiff had no notice or knowledge of any infirmities in respect to the check at the time the payment was made thereon. *Held*, that plaintiff was entitled to recover the full amount of the check, with interest, less any amount paid thereon by the payee.

ACTION on a check tried before the court without a jury.

W. S. O'Brien, for plaintiff.

Myron D. Short, for defendant De Rosa; defendant Fox not appearing.

CUNNINGHAM, J. Action on a check for $250, dated February 25, 1921, made by the defendant De Rosa to the order of defendant Fox. De Rosa gave the check to Fox in payment for some shares of stock to be thereafter delivered to him and took a receipt therefor. De Rosa thereafter talked with some of his friends and came to the conclusion he did not want to purchase the stock as agreed. On the following Monday (February twenty-eighth) De Rosa and Fox met again and De Rosa said he did not want to buy the stock. Fox said he did not have the check as he had sent it in to the company. Thereupon De Rosa gave back to Fox the receipt he had received from him.

On March first defendant Fox presented the check to the Geneva National Bank, plaintiff herein, and received two hundred and five dollars in cash, the balance of forty-five dollars being deposited to his

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account. At this time Fox had in the bank the sum of thirty-five dollars and twenty-three cents which, together with the forty-five dollars credited to him, made a total of eighty dollars and twenty-three cents. On the second day of March he withdrew eighty dollars, leaving a balance of twenty-three cents.

In the meantime defendant De Rosa had stopped payment of the check at the Canandaigua National Bank, on which it was drawn, and when it was presented for payment on March fourth in the usual course of business, payment was refused and the check protested. No part of the money has been paid except the sum of ten dollars paid thereon by defendant Fox. At the time plaintiff made payment on the check to defendant Fox it had no notice or knowledge of any infirmities in respect to it.

The plaintiff became the holder of the check for value. *Merchants National Bank* v. *Santa Maria Sugar Co.*, 162 App. Div. 248.

The plaintiff became the holder of the check in due course. Neg. Inst. Law, § 91; *Riverside Bank* v. *Woodhaven Junction Land Co.*, 34 App. Div. 359.

The defendant relies upon the case of *Linick* v. *Nutting*, 140 App. Div. 265. In that case it appears that a blank check which had been signed by the plaintiff was afterwards stolen, filled in and indorsed to an innocent person. The court held that the plaintiff was not liable on the check, relying upon section 34 of Negotiable Instruments Law which provides that "where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, * * *." Section 35 of the Negotiable Instruments Law provides that "* * * where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to

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make them liable to him is conclusively presumed." The court in its opinion held, reading sections 34 and 35 together, that the conclusive presumption as to delivery stated in section 35 referred to complete instruments but not to incomplete instruments. As in this case the instrument was complete when delivered to defendant Fox the decision just quoted does not apply. Furthermore, it was held in the case cited above that if an instrument were put in circulation through the fault or negligence of the maker then he was liable. In this case it is conceded that the check was delivered by De Rosa to Fox, that subsequently De Rosa attempted to rescind the transaction and thereupon stopped payment upon the check.

It has been held by the Court of Appeals that the holder of a negotiable instrument, acquired in due course, is entitled to retain it against the owner from whom it has been stolen. *Hibbs* v. *Brown,* 190 N. Y. 167.

The plaintiff being a holder in due course is entitled to recover against maker even though the instrument was diverted through the fraudulent acts of the payee. *Wallabout Bank* v. *Peyton,* 123 App. Div. 727; *Eisenberg* v. *Lefkowitz,* 142 id. 569.

Judgment for the plaintiff for $240 with interest from March 4, 1921, together with costs.

Judgment for plaintiff.

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PEOPLE OF THE STATE OF NEW YORK v. KATHRYN JOHNSON et al., Appellants.

(Court of General Sessions of the Peace in and for the County of New York, November, 1921.)

Constitutional law — city ordinances — when distribution of handbills not illegal — Constitution of State, art. I, § 8 — Code of Ordinances of the city of New York, § 15, art. 2, chap. 22.

While a city ordinance, within reasonable limits, is proper and should be sustained, no such ordinance, no matter how worthy its intendment, should be permitted in any way to curtail any of the fundamental rights of the citizen.

Where the only evidence to sustain a conviction for a violation of section 15, art. 2, chap. 22 of the Code of Ordinances of the city of New York declaring that "No person shall throw, cast or distribute * * * any handbill, circular or other advertising matter whatsoever," etc., was the testimony of the police officers making the arrest, to the effect that defendants were handing out in front of a theatre circulars entitled "Stop the Ku Klux Propaganda in New York" which were an appeal to the public not to encourage what it was claimed was an effort to glorify through the medium of a moving picture the activities of an organization having for its primary purpose the stirring up of prejudices and animosities against certain races and religions, the conviction will be reversed and the complaint dismissed upon the ground that the defendants in making such public protest were acting within their constitutional rights. (Const. of State, art. I, § 8.)

APPEAL from judgment of the City Magistrate's Court, borough of Manhattan, city of New York, convicting defendants of violation of city ordinance.

Edward Swann, district attorney (Felix C. Benvenga, of counsel), for People.

Aiken A. Pope, for defendants.

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TALLEY, J. This is an appeal by the defendants from a judgment of the City Magistrate's Court, borough of Manhattan, convicting them of a violation of section 15, article 2, chapter 22, of the Code of Ordinances of the City of New York, which reads as follows: "No person shall throw, cast or distribute, or cause to be thrown, cast or distributed, any handbill, circular, card or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any buildings, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the postal service."

The defendants were placed under arrest in front of a theatre, and the evidence was that police officers had observed the defendants handing out circulars.

It was not charged that there was any disorder, and there is no other question presented in this case except this: Did the defendants violate the ordinance in question by peaceably distributing circulars upon the night in question?

At the time of the arrest of the defendants a moving picture was being exhibited in the theatre in question, which it is claimed exalted the activities of an organization known as the Ku Klux Klan. At the time of the arrest of the defendants in question, the daily press of this city was devoting considerable space to the announcements made by an organization bearing the same name of its revival and reorganization throughout the country. The circular which the defendants were distributing bore the announcement that it was published by the "National Association for the Advancement of Colored People," and the defendants were acting as agents of that association.

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The paper which they distributed was entitled, "Stop the Ku Klux Propaganda in New York," and was an appeal to the public not to encourage what, it was claimed, was an effort to glorify through the medium of a moving picture the activities of an organization which, it was asserted, had for its primary purpose the stirring up of prejudices and animosities against certain races and religions in this country.

In the opinion of this court, the defendants were well within their rights in distributing the circulars in question, and the complaint against them should have been dismissed. I hold that the ordinance in question was never intended to prevent the lawful distribution of anything other than commercial and business advertising matter, and the circular in question does not come within that category. It would be a dangerous and un-American thing to sustain an interpretation of a city ordinance which would prohibit the free distribution by a body of citizens of a pamphlet setting forth their views against what they believed to be a movement subversive of their rights as citizens. The Constitution of the State of New York, article I, section 8, provides that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

The primary purpose of the ordinance which it is claimed was violated by these defendants, was to prevent the littering of streets with commercial advertising, such as a merchant or shopkeeper might send forth for the purpose of aiding the sale of purchasable commodities. The ordinance within reasonable limits is a proper one, and should be sustained, but no city ordinance, no matter how worthy its intend-

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ment, should be permitted in any way to curtail any of the fundamental rights of the citizen.

The circular in question was a protest against what was believed to be a movement which encouraged discrimination against certain classes of citizens because of race, color or religious beliefs, and whether or not there was a sound basis for that belief, they were within their rights in making public their protest against such a movement, and to make known their protest they used possibly the only means available by the distribution of circulars and pamphlets to the public.

The judgment of the magistrate herein is reversed, and the complaint against the defendants dismissed.

Judgment reversed.

ABRAHAM L. ROSENZWEIG, Plaintiff, *v.* GUSSIE PORTNOY, Defendant.

(Municipal Court of the City of New York, Borough of The Bronx, Second District, November, 1921.)

Landlord and tenant — summary proceedings — ejectment — jurisdiction — when summary proceedings cannot be maintained — Code Civ. Pro. § 2232 — Civil Practice Act, § 1411(4).

It is essential to the maintenance of summary proceedings instituted under section 2232 of the Code of Civil Procedure, now section 1411(4) of the Civil Practice Act, that the one sought to be removed has "intruded into" or "squatted upon" the premises, and has continued to occupy the same without permission which if ever granted has been revoked upon notice to the intruder or squatter.

Defendant was given permission to occupy plaintiff's residence and use the furniture as a guest during plaintiff's absence upon condition that he would vacate the premises at any time upon the request of plaintiff. Defendant occupied the premises for several months, and notwithstanding the fact that plaintiff thereafter revoked the permission given, continues in

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occupancy of the premises though ten days prior to the institution of the proceedings, notice to quit had been served upon him. *Held,* that a motion to dismiss the proceeding instituted under section 1411(4) of the Civil Practice Act, on the ground that the petition was jurisdictionally defective, will be granted and plaintiff remitted to an action of ejectment.

MOTION to dismiss summary proceedings.

Vincent Lippe, for plaintiff.

Samuel M. Newman, for defendant.

ROBITZEK, J. The plaintiff alleges that he is the lessee of an apartment in premises 1804 Washington avenue, Bronx, and that the premises were the home and residence of the plaintiff and on March 5, 1921, he permitted the defendant to use his furniture and to occupy the said premises as his guest during his absence, upon condition that said defendant would vacate said premises at any time upon the request of the plaintiff. That defendant entered into occupancy of the same and that on September 5, 1921, the plaintiff revoked the permission given but that the defendant continues in occupancy and that defendant is now an intruder and a squatter of this apartment and that plaintiff is being forcibly kept out of the possession of his home and residence. That ten days prior to the commencement of these proceedings a notice to quit and vacate the premises was served upon this defendant.

The defendant moves to dismiss the proceedings on the ground that the petition is jurisdictionally defective.

The Civil Practice Act has furnished a simple and inexpensive mode of ridding property of squatters by removal under summary remedy previously

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allowed only against refractory and delinquent tenants. The statute relating to squatters is intended to include within its remedial objects any person who settles or locates on land without legal title or lawful authority from the person who has.

"A squatter may be defined to be a person who settles or locates on land without legal permission. He is a trespasser, because he goes upon the land without the authority of the owner." 2 McAdam Landl. & Ten. (4th ed.) § 308, p. 1075.

This proceeding is brought under section 2232 of the Code of Civil Procedure, now section 1411 of the Civil Practice Act, and particularly under subdivision 4 thereof, which reads as follows: "Where he or the person to whom he has succeeded has intruded into or squatted upon any real property without the permission of the person entitled to the possession thereof and the occupancy thus commenced has continued without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed."

The essential to the maintenance of summary proceedings under this subdivision is that the person sought to be removed has "intruded into" or "squatted upon" the premises without permission and continued to occupy the same without permission (*Commonwealth Mort. Co.* v. *De Waltoff*, 62 Misc. Rep. 639), or if the permission were ever granted, it has been revoked and notice of the revocation given to the intruder or squatter.

There is no question but that the defendant obtained possession and entered upon the occupancy of the premises in a lawful manner. It is not claimed that he "intruded into" or "squatted upon" the premises. The petitioner, however, claims that he

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entered as a guest with permission of the plaintiff, subject to his rights to revoke that permission at plaintiff's pleasure; and after a notice of revocation of the permission the defendant became a squatter and claims that these proceedings will lie against him.

I do not think that summary proceedings can be maintained against this occupant but that the owner must resort to other remedies. The word "permission" as used in the latter portion of subdivision 4 of section 1411 of the Civil Practice Act, has reference to permission given to a person to occupy the premises after such person has "intruded into" or "squatted upon" the same.

These words in the subdivision refer to the original entry into or upon the property.

In *O'Donnell* v. *McIntyre*, 41 Hun, 100, the court placed a like construction on subdivision 4, the General Term of the Supreme Court holding: "the only question to be determined is, did the respondent gain possession of the premises as an intruder within the meaning of that term as the same is used in said section? * * * and the latter acquired his possession without the consent and against the will of the appellant. This makes a complete case, entitling the injured party to relief in a summary manner * * *."

The defendant contends that the petitioner should have alleged that the proceeding is brought in good faith, but this requirement does not apply to a squatter as the emergency law applies only to section 1410 of the Civil Practice Act, not to section 1411.

It is evident that the petition does not state facts sufficient to maintain summary proceedings and it is therefore unnecessary to consider the other contention of the defendant, except that it is evident that the defendant is not a squatter, within the meaning of the act and therefore the petitioner should be

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remitted to the ordinary action of ejectment, which is the appropriate remedy for this purpose.

The motion of the defendant is granted and the proceedings are dismissed.

Motion granted.

HERMAN APPELBAUM, Plaintiff, *v.* ALBERT B. GROSS et al., Defendants.

(Supreme Court, Kings Special Term, November, 1921.)

Motions and orders — partial judgment — admission in answer of part of amount due — Rules of Civil Practice, rules 113, 114.

The words "such defense" in rule 114 of the Rules of Civil Practice plainly have reference to the defense specified in the preceding rule 113, and when the two rules are read together, as they must be, the remedy afforded by rule 114 can be granted only in a case in which a summary judgment may be entered under rule 113.

Where in an action to recover money alleged to be due under contracts of employment the answer admits that a certain sum, a part of the entire claim, was found to be due plaintiff at the date of an accounting between the parties of the transactions constituting the subject matter of the action, a motion under rule 114 of the Rules of Civil Practice for final judgment for the part so admitted to be due, will be granted, even assuming that every allegation in separate defenses be proven to be true.

The historical source of both of said rules stated.

MOTION for partial judgment under rule 114, Rules of Civil Practice.

Katz & Sommerich, for plaintiff.

Meier Steinbrink and Frank E. Johnson, Jr., for defendants.

KAPPER, J. This motion is made under rule 114 of the Rules of Civil Practice for final judgment for a

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part of an entire claim alleged to be admitted. The action is brought to recover the sum of $152,035.92 alleged to be the share of the profits in defendants' business to which the plaintiff is entitled under contracts of employment covering the period from February 1, 1910, to February 1, 1921. These contracts are three in number and each is the subject matter of a separate cause of action set forth in the complaint. The first agreement is dated February 1, 1910, and, as subsequently modified by supplemental agreement, covers the period to February 1, 1915. The second is dated February 1, 1915, and covers a period of three years. The third is dated January 7, 1918, and covers the period of three years from February 1, 1918. By these several contracts the plaintiff is employed by the defendants as manager of the raw, dressed and dyed skin department of defendants' business for the periods therein specified, at a stated compensation per week and a specified per cent of the net profits of that department. Provision is made for an accounting on the first of February in each year to determine the net profits or loss for the preceding year and the proportion of such profits, if any, to which plaintiff should be entitled. It is also provided that on such accounting, in computing the net profits, certain items by way of interest, rent, wages, expenses, and other items therein specified, shall be first charged and deducted. It is further provided that plaintiff shall not withdraw his share of the profits, so ascertained, until the termination of the agreement and that, if a loss is disclosed for any year, a specified per cent thereof shall be deducted from the total amount due plaintiff. The last of these contracts, that of January 7, 1918, provides that the amount of net profits, which shall be found to be due to the plaintiff on the accounting of February 1, 1918, shall remain as a loan by

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plaintiff to the defendants, at a specified rate per cent of interest, to be withdrawn at the time and in the manner therein specified. These contracts differ slightly as to the amount of the weekly compensation and the per cent of profits which plaintiff is to receive and also in some other particulars not here material to be considered. It is not contended that these contracts create in any sense a copartnership. They are simple contracts of employment. The amount claimed in the first cause of action, under the first of said contracts, is $45,000; in the second cause of action, under the second contract, $89,000 is claimed; and, in the third cause of action, based upon the last of said contracts, $18,035.02 is claimed. And these several amounts are claimed to be due as profits under said agreements. The answer contains two defenses to the *first* cause of action. The first defense alleges an accounting on February 1, 1915, whereby a certain sum was found to be due the defendants from the plaintiff, payment of which was waived by the defendants and the plaintiff discharged from the obligation thereof, and that plaintiff accepted and received such waiver and discharge in full satisfaction of his claim for all services up to February 1, 1915. The *second* defense alleges substantially the same matter by way of express agreement of settlement and discharge. For a defense to the *second* cause of action, covering the period from February 1, 1915, to February 1, 1918, defendants allege that annual accountings were had for each of said years and that specified amounts found due the plaintiff on said accountings were duly paid by the defendants. The defense to the *third* cause of action sets forth accountings had on January 1, 1919, and January 1, 1920, and payment in full of the specified amounts found to be due to the plaintiff. The answer then alleges that a similar accounting was

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had on January 1, 1921, upon which the sum of $15,823.72 was found to be due plaintiff on that date, and that before the commencement of this action said sum was duly tendered the plaintiff, together with interest, which the plaintiff refused, "and that defendants have ever since been ready and willing to pay plaintiff said sum but that plaintiff has hitherto refused to receive the same." The substantial allegations of the answer are denied in a reply duly served. The plaintiff claims that the above sum, less a proper deduction of $1,000, is admittedly due within the meaning of rule 114 and he therefore makes this motion for final judgment for the sum of $14,823.72.

The first question to be determined is whether the said sum is admitted to be due. Prior to this action on February 7, 1921, the defendants wrote to plaintiff the following letter: "We are herewith enclosing a check for the sum of $14,823.72. This amount together with the $1,000 that you owe B. Morsoff and which sum was charged to your account and credited to Morsoff's account makes up the total of $15,823.72, as per statement handed to you by the accountant, Mr. Freeman." The statement of Mr. Freeman, referred to in this letter, is entitled "*Statement of account of H. Apfelbaum for the year 1920,*" and shows a balance of $15,823.72. On February ninth plaintiff replied to the above letter, claiming that over $20,000 was due in addition to the said sum of $14,823.72, and declined to accept the check except on condition that the acceptance should be without prejudice to the rights of either of the parties. Subsequently the check was returned to the defendants. In an affidavit, verified November 7, 1921, Mr. Engel, one of the defendants, states that when he wrote the above letter of February seventh he was not offering the $14,823.72 as plaintiff's share of the profits for the year 1920,

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but was "offering that sum to cover all past claims, about which there already had been much discussion." And he further affirms "Our position always has been that on January 1, 1921, a full statement of all the profits during the years he has been with us showed that the amount we were then offering him was all that was *then* due him." I think that the statements in the above correspondence, the affidavit of Mr. Engel and the answer constitute a clear and unequivocal admission that said sum was due the plaintiff as his share of the profits under said contracts of employment.

The next question presented is whether the phraseology of rule 114 to the effect that a plaintiff may have final judgment "for so much of his claim as such defense does not apply to or as is admitted" confers jurisdiction to direct final judgment for an admitted balance of the character here involved. As I construe the admission, the balance in question represents the entire amount due plaintiff after a final adjustment of the rights and obligations of the parties which have accrued during the entire period of their relationship from February 1, 1910, to February 1, 1921. This balance is not capable of being segregated from the total earnings and assigned to any particular period of time. It does not represent profits arising from any definite and specific transaction, which may be separated from the mass. It cannot be said surely to grow out of either of the causes of action set forth in the complaint. It is a general balance, resulting from many business transactions in which large numbers of charges and credits were made during the entire period of plaintiff's employment. Does such an admitted balance fall within the purview of the rule? The words "such defense" in rule 114 plainly have reference to the

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defense specified in the preceding rule 113. The two rules, therefore, must be read together. When so read, it seems apparent that the remedy afforded by rule 114 can be granted only in a case in which a summary judgment may be entered under rule 113. It is necessary, therefore, to determine if the present action is one of those specified in rule 113; for, if it be not, then this motion cannot be granted. These rules find their ultimate source in certain rules and orders of the English Judicature Acts, known as the "Rules of the Supreme Court, 1883." *Order 3, rule 6,* reads as follows: "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A.) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B.) on a bond or contract under seal for payment of a liquidated amount of money; or (C.) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D.) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E.) on a trust; or (F.) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant; *the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled.*"

Order 14, rule 1, reads as follows: "Where the defendant appears to a writ of summons specially indorsed under *Order III, Rule 6,* the plaintiff may,

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on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a Judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The Judge may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence, or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."

Order 14, rule 4, is as follows: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, *or that any part of his claim is admitted,* the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to *or as is admitted,* subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

Under the English act, therefore, jurisdiction to enter summary judgment was confined to the class of cases enumerated in *order 3, rule 6,* where the summons might, at the option of the plaintiff, be specially endorsed; and a reading of that order discloses that a summons could be so endorsed in actions, among others, to recover a debt or liquidated demand in money arising upon a contract express or implied, including a simple contract debt. The language

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employed is substantially identical with that adopted in our rule 113. In considering the scope of *order 3, rule 6,* the English courts have decided that anything that could be sued for under the *indebitatus counts* comes within the purview of the words "debt or liquidated demand," and that these counts include actions for "goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated." *Lagos* v. *Grunwaldt,* L. R. (1910) 1 K. B. Div. 41, 48; *Workman, Clark & Co., Ltd.,* v. *Brazileño,* (1908) Id. 968; *Pathé Frères Cinema, Ltd.,* v. *United Electric Theatres,* (1914) 3 id. 1253. The *Lagos* case was an action upon a *quantum meruit;* and the *Pathé* case was an action to recover a balance alleged to be due for goods sold and delivered and goods hired out, and involved many items of small value. The *Workman* case was for partial judgment for an instalment admittedly due under a contract. It seems to me that under these authorities the present action is embraced in the class of cases specified in the English rules, which correspond to our rules 113 and 114. The accountings provided for in the several agreements here involved are in no sense accountings growing out of a fiduciary or other relationship governing accountings in equity. They rest in simple agreement. Their sole purpose is to aid in determining the amount due plaintiff as compensation for services rendered under contracts of employment. Plaintiff has performed in full on his part, the stipulated compensation is earned, and the action is one to recover a debt due under an express contract. The summons could have been specially endorsed under the English rule and the court would have had jurisdiction to grant the summary relief authorized under order 14, rule 1. Such, as I read them is the purport of the decisions referred to. Rule 113 of our Rules of Civil Practice provides for

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a summary judgment, in the manner there indicated, "in an action to recover a debt or liquidated demand arising (1) on a contract, express or implied, sealed or not sealed." The class of cases here specified falls within the category of the first and principal class embraced in the English act. In accordance with the decisions of the English courts, as I read them, I am, therefore, of the opinion that this action is embraced within the scope of rule 113.

And now to return to the question whether the plaintiff is entitled to the relief he asks under rule 114. I think the answer must be in the affirmative. Assuming that every allegation contained in the separate defenses in the answer be proven to be true, there is still the unequivocal admission that on January 1, 1921, the defendants owed the plaintiff the sum of $14,823.72 as a balance upon the transactions constituting the subject matter of the action. The admission, in my opinion, subjects the defendants to the jurisdiction of the rule. I think the rule accomplishes a needed reform in the domain of the law. It may be drastic, even revolutionary, in the changes effected in our judicial procedure, but we should not overlook benefits conferred upon a creditor in the contemplation of a fancied hardship imposed upon the debtor. The purpose of the English rule, which finds its counterpart in our rule 113, was to enable a creditor speedily to obtain a judgment by preventing the interposition of unmeritorious defenses for purposes of delay. Statements to this effect may be found in the following cases: *Thompson* v. *Marshall,* 41 L. T. Rep. (N. S.) 720; *Lloyds Banking Co.* v. *Ogle,* 34 id. 584; *Jones* v. *Stone,* 70 id. 174. Thus, in the case of *Jones* v. *Stone,* the court said: "The proceeding established by that order (Order 14) is a peculiar proceeding, intended only to apply to cases where there can be no

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reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay."

If the purpose of rule 113, and the corresponding English rule, is to aid a creditor in the speedy acquisition of a judgment for an entire claim, against which the debtor has no meritorious defense, then, by parity of reasoning, the law should also aid the creditor in obtaining a judgment for a part of that claim, admittedly due and undefendable. This purpose is accomplished by rule 114. The same moral obligation rests upon the debtor to pay the part as to pay the whole, and a failure to meet the obligation justifies a judgment equally in the one case as in the other. No hardship is imposed by compelling a debtor to presently pay what he presently owes. Why should a debtor be absolved from the present payment of what he admits to be due because the creditor, acting within his legal rights, asserts that he owes more? Why should a creditor be denied a judgment for an admitted amount because the debtor says in effect "you have not yet proven that I owe more than I admit to be now due." Moreover, a judgment for the amount of an entire claim, obtained after a protracted litigation, is frequently valueless because of the then financial irresponsibility of the debtor; whereas, a judgment for the admitted part of the claim may be presently collectible. Possibly these and similar considerations have found expression in the rule. I think the application should be granted. The English decisions seem to me to point the way. *Dennis* v. *Seymour*, 42 L. T. R. 31; *Parker* v. *Guinness*, 27 T. L. Rep. 129; *Purkiss* v. *Low*, 3 id. 63, 64; *Blumberg* v. *McCormick*, (1915) 2 Ir. Rep. 402. One further consideration may be noted: The relief afforded by rule 114 is to be granted "on such terms as may be just." The English rule

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(order 14, rule 4), above quoted in full, specifies the terms, that is to say, "the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to *or as is admitted*, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim." The framers of rule 114 evidently intended to broaden its scope in this respect, by omitting specifications leaving it to the court in all instances to provide such terms as the justice of the case required. In the English cases the most frequently applied terms have been the direction to pay the admitted amount due into court as a condition of permitting the defendant to defend as to the residue. The parties may be heard on the question of terms on the settlement of the order.

Ordered accordingly.

HARRY S. CRAWFORD, Plaintiff, *v.* AMELIA WOODS et al., Defendants.

(Supreme Court, Kings Special Term, November, 1921.)

Dower — release of — judgment creditor's action — execution — judgment not a lien on inchoate right of dower.

A wife cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person.

A complaint after alleging the recovery of a money judgment against two married women and the return of an execution *nulla bona* issued upon the judgment, alleged the "possession" by said defendants of an inchoate right of dower in certain described premises the fee of which was vested in their

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husbands. It was further alleged that by a subsequent conveyance of the premises by said husbands, in which their wives joined, they released their right of dower in said premises, that plaintiff's judgment was a lien against the dower right of the defendant wives and that the grantees took the conveyance subject to the lien of plaintiff's judgment, and the prayer for relief was that the aforesaid judgment, with the accrued interest thereon, be adjudged a lien upon the premises and continue as such, etc. On cross-motions for judgment on the pleadings, *held*, that the motion on behalf of plaintiff must be denied and that of defendants granted and the complaint dismissed.

CROSS-MOTIONS for judgment on the pleadings.

Louis J. Halbert, for plaintiff.

Lynn C. Norris, for defendants.

KAPPER, J. Cross-motions for judgment on the pleadings consisting of a complaint and a demurrer thereto. The complaint alleges plaintiff's recovery of a judgment against the defendants Amelia Woods and Sophie Anwander for $167.95; the issuance and return unsatisfied of an execution against said judgment debtors; the "possession" by said judgment debtors of an inchoate right of dower in certain premises described in the complaint the fee of which was vested in the husbands of said judgment debtors; the subsequent conveyance of said premises by said husbands to two other defendants named, in which conveyance the said wives, the judgment debtors, joined, whereby they "released their right of dower in the said premises" to the said defendants' grantees; "and that said judgment is a lien against the dower of the said defendants, Amelia Woods and Sophie Anwander, in the said premises aforesaid, and that the defendants Abraham Stepein and Abraham Kern,

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took a conveyance of the said premises aforesaid, subject to the lien of the said judgment." Then follows the prayer for relief, namely: "Wherefore deponent (*sic*) prays for judgment herein that the judgment aforesaid in the sum of One hundred and sixty-seven and 95/100 ($167.95) Dollars together with the accrued interest thereon, be adjudged and to be a lien upon the hereinbefore described premises, and revive and continue as such, and that an execution may issue against said property and a sale be had of such premises to satisfy the said judgment and for such other and further relief, as to this court may seem just and proper." No charge of fraud is made against any of the defendants. The action has the merit of novelty in that it is concededly without precedent. In *Sherman* v. *Hayward,* 98 App. Div. 254, it was sought to satisfy a judgment recovered against a wife out of her inchoate right of dower, and it was held that *a wife's inchoate right of dower in real property owned by her husband could not be reached in a judgment creditor's action.* The distinction between the case cited where there had been no transfer of the property and the one at bar is that here a ruling is sought to hold the *release* of dower as the creation of an estate of such tangibility and segregation as to be reachable by a judgment creditor's action. This view ignores the nature or character of an inchoate right of dower. A wife cannot convey or assign her inchoate right of dower. When she joins with her husband in his conveyance she merely releases a *contingent future right* which operates against her solely by way of an estoppel. *Malloney* v. *Horan,* 49 N. Y. 111, 118. She cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person. *Malloney* v. *Horan, supra.* Washburn on Real Prop-

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erty (vol. 1 [5th ed.], 312) says: "It is no right which her husband can bar or incumber; nor she herself, except by deed in which her husband joins, and then it is only in the way of estoppel, for her deed even of grant does not pass any title to the estate. *She has not, in this stage of her right, even a chose in action in respect to the estate;* nor can she protect it in any way from waste or deterioration by her husband or his alienee; nor is her right at law in any sense an interest in real estate nor property of which value can be predicated. She cannot convey it, nor is it a thing to be assigned by her during the life of her husband." During the life of the husband the right is a mere expectancy or possibility. *Sherman* v. *Hayward, supra.* In Scribner on Dower (vol. 2 [2d ed.], 5), it is said: "It is difficult to state with precision the nature and qualities of inchoate dower interest when considered as a right of property. A certain vagueness of expression uniformly characterizes the discussions of the subject, and these discussons are commonly attended with unsatisfactory results. 'It is not easy,' says a distinguished jurist (McLean, J., in *Johnson* v. *Van Dyke,* 6 McLean, 422), 'to define the right of dower before the death of the husband * * *. It is not only an inchoate right, but contingent. It depends upon the death of the husband. If he survives his wife, she has no right transmissible to her heirs nor during the life of her husband can she give it any form of property to her advantage * * *. So long as the husband shall live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right—if it may be called a right—is shadowy and fictitious, and, like all rights which are contingent, may never become vested.'" Similar language is employed by the court

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in the case of *Moore* v. *City of New York*, 8 N. Y. 110. It is there said that the inchoate interest of the wife is "a right to a claim for dower, contingent upon her surviving her husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment, nor is it in any sense, an *interest in real estate*. It is not of itself property, the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated so as to entitle the widow to demand and receive a freehold estate in the land * * *." Enough has been said to indicate that the defendants, wives, possessed nothing tangible when they joined in the conveyance, and it would logically follow that the creditor lost nothing by such conveyance. It would require an unprecedented ruling to charge the estate of the defendants, grantees, with the lien of plaintiff's judgment in the circumstances here shown. I am disinclined to create the precedent. The plaintiff's motion must be denied and that of the defendants for judgment on the pleadings and that the complaint be dismissed must be granted, with costs and ten dollars costs of motion.

Ordered accordingly.

RAE B. S. TWIGG, Plaintiff, *v.* CHARLES E. TWIGG, Defendant.

(Supreme Court, Kings Special Term, November, 1921.)

Judgment — motion for summary judgment — moving affidavit held insufficient — practice of submitting successive affidavits disapproved — Rules of Civil Practice, rule 113.

Where to a complaint alleging an account stated the answer is a general denial, the case is not within rule 113 of the Civil

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Practice Rules, and a motion by plaintiff for summary judgment will be denied.

Upon a motion for summary judgment under rule 113 of the Civil Practice Rules the practice of submitting successive affidavits, piecing and stringing out the assumed right to such a judgment, resolves itself into a trial by affidavit and creates a condition which ought not to obtain, and is, therefore, of doubtful propriety.

MOTION for summary judgment under rule 113, Rules of Civil Practice.

James M. Fawcett, for plaintiff.

Robert H. Elder, for defendant.

KAPPER, J. Plaintiff moves for a summary judgment under rule 113, Civil Practice Rules. The complaint alleges a cause of action upon an account stated. The answer is a general denial. Rule 113 provides that when an answer is served in an action to recover a debt or liquidated demand arising on a contract "the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action, unless the defendant by affidavit or other proof shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend." The affidavit upon which the motion is based adds nothing to the complaint, for it simply declares that the defendant "is justly and truly indebted" to plaintiff in the sum stated in the complaint "and was so indebted at the commencement of this action." And then is added the following: "The particulars of the said sum appear upon the complaint in this

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action and constitute an account stated between the plaintiff and the defendant made on the 7th day of December, 1919; that she verily believes that there is no defense on the part of the defendant to this action." The defendant's affidavit is equally meagre in that it does little more, if anything, than to reassert the general denial of the answer. This affidavit avers the following: "I ask the court to deny plaintiff's motion for summary judgment under rule 113 of the Rules of Civil Practice for these reasons: (1) The allegation in the complaint that plaintiff and I stated an account upon which a balance of $6,107.98 was found to be due from me to her is untrue. (2) The allegation in the complaint that I ever promised to pay plaintiff the sum of $6,107.98 is untrue. (3) It is not true that I owe plaintiff the sum of $6,107.98." Plaintiff, upon receipt of defendant's affidavit, submitted an additional affidavit going into greater detail as to the specific items of the claim or purported account. I doubt the propriety of such a practice, as successive affidavits piecing out and stringing out the assumed right of summary judgment resolves itself into a trial by affidavits and creates a condition which I do not think ought to obtain. But, waiving that consideration, on the material point upon which I think this motion must turn, I do not find anything more in this second affidavit of plaintiff to establish an *account stated* than is contained in the preceding papers. It must be borne in mind that the action is not brought for the balance due upon an account, but is based upon the claim that the parties have stated an account or have duly agreed upon the balance due and owing. "The mere rendering of an account by one party to another is not sufficient to make it an account stated. For that purpose there must be either the actual statement and adjustment of the account by the parties,

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by going over the items together and striking the balance, or an admission by one party of the correctness of the balance struck by the other, or some other evidence to show that the party sought to be charged has by his language or conduct admitted the correctness of the account." 1 C. J. 680. Tested in the light of the quoted rule of law, this case presents nothing more, in my opinion, than an assertion of an account stated by plaintiff and an equally efficacious denial thereof by the defendant. In these circumstances I do not think that a case within rule 113 has been made out. It has long been the law of this state that a general denial cannot be stricken out as sham. It is not necessary to decide in this case whether upon a proper showing by plaintiff summary judgment may be ordered, notwithstanding a general denial. A case undoubtedly will arise wherein the value of a general denial upon an application for summary judgment will have to be tested, but this does not seem to me to be such a case. Under the English rules of practice, from which our rule 113 has been derived, the value of a general denial has been stressed so as to render it exceedingly difficult to obtain a summary judgment in the face of such a denial. For instance, in *Lloyd's Banking Co. (Limited)* v. *Ogle*, 34 L. T. Rep. (N. S.) 584, 586, Bramwell, B., said: "It seems to me that the statute * * * was intended to apply to such cases as, almost upon the admission of the defendant, are undefended causes, and where a plea, if it should be put in, could be for the purpose of delay only; and that it was not intended to apply to cases where the defendant might reasonably say, 'I do not know whether your (the plaintiff's) case is a well founded one or not, and I require you to prove it against me.'" That view was reiterated by the same judge in *Thompson* v. *Marshall*, 41 L. T. Rep. (N. S.) 720. In *Jones* v. *Stone*,

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70 L. T. Rep. (N. S.) 174, Lord Halsbury said: "The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay." And in *Codd* v. *Delap*, 92 L. T. Rep. (N. S.) 510, Lord James stated: "I wish to add that I think Order 14 is a very useful process indeed, but it has to be used with great care, and must never be used unless it is clear that there is no real substantial question to be tried."

Motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK v. JOSEPH COHEN.

(Supreme Court, New York Special Term, November, 1921.)

Criminal procedure — murder — evidence — weight to be given recantation of witness — newly discovered evidence — effect of conviction of recanting witness for perjury — accomplice — necessity of corroboration — conflicting statements — when court need not hear witnesses orally upon motion for new trial — new trial granted because of false testimony of principal witness for prosecution — Code Crim. Pro. § 465(7).

After an important witness for the prosecution in a capital case had recanted, the sentence imposed upon defendant was commuted to imprisonment for life. At the time of the argument of a motion for a new trial on the ground of newly discovered evidence, to wit, that the recanting witness had committed perjury on the trial of defendant, said witness was awaiting trial under an indictment charging him with such perjury. *Held*, that if the court was satisfied that the recantation of the witness was not of such weight as to require the

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granting of the motion for a new trial, it was its duty to disregard the verdict of the jury convicting said witness of perjury in the giving of his testimony on the trial of defendant.

Upon consideration of the records on the trial of defendant and on the trial for perjury, *held*, that the testimony given by the recanting witness on the trial of defendant was of such basic importance as to require the court to grant the motion for a new trial, it appearing that the preponderance of evidence, considered apart from the conviction of the recanting witness for perjury, shows that he did commit perjury against those charged with the murder; the perjury need not be established beyond reasonable doubt.

Where the record discloses that witnesses have already been examined, the court is not called upon to hear them orally as it might under section 465(7) of the Code of Criminal Procedure.

The possible reversal of the judgment convicting the recanting witness of perjury on the trial of defendant has no bearing upon the motion for a new trial, need not be considered, and the motion will be granted.

MOTION for new trial after conviction for murder.

Goldstein & Goldstein, by Jonah J. Goldstein, for the application.

Charles D. Newton, attorney-general, by Alfred L. Becker, opposed.

GAVEGAN, J. This is a motion for a new trial of Joseph Cohen, who was tried in June and July, 1917, for the murder of Barnett Baff on November 24, 1914. He was convicted and sentenced to be executed. He obtained several respites, and after the recantation of Sorro, a witness at his trial, and a very extensive inquiry, conducted before a judge of the Court of General Sessions sitting as a magistrate, his sentence was commuted to life imprisonment.

The application for a new trial is made on the well recognized ground of newly discovered evidence, the

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newly discovered evidence in this case being that of the perjury alleged to have been committed by Sorro in his testimony at the trial of Cohen. On the argument of the motion, which took place while Sorro was awaiting trial under the indictment charging him with such perjury, I announced that decision would be reserved pending the outcome of Sorro's trial.

Now that Sorro has been convicted, the People of the State of New York virtually join in the application, the attorney-general consenting that it be granted, but on a novel and impracticable condition. The condition or suggestion is that the court retain jurisdiction to annul its determination if there be an appeal and a reversal of Sorro's conviction. The value of the suggestion, were such a conditional determination possible, depends upon the bearing that a reversal of that conviction would have upon the substantial merits of the application. This will be considered below.

Commendable as the action of the attorney-general is in freely admitting that Sorro's testimony was of sufficient importance to require the court to grant Cohen a new trial, so long as it remains legally established that such testimony was false and perjured, the responsibility for the disposition of the application nevertheless falls on the court alone. This would be no light burden in any murder case. But the circumstances leading up to and surrounding the murder of Barnett Baff, which were revealed only after years of inquiry, as well as the place and manner of its perpetration, which displayed the most brutal and atrocious disregard of human life and of the interests of the state in the maintenance of law and order, made the apprehension and conviction of all responsible for it a matter of the gravest public concern. Furthermore, this feeling of responsibility is enhanced by the

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unsatisfactory showing that Cohen made as a witness for the defense at the trial of himself and others charged with procuring the murder, hereinafter referred to as the Cohen trial. The impression made by his own testimony is so unfavorable as to predispose the court against granting Cohen anything more than he is unquestionably entitled to receive.

"Evidence of recantation on the part of a witness is newly discovered evidence, and therefore of a character which would justify granting a new trial; but it cannot be said, as a matter of law, that a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony, since there is no form of proof so unreliable as recanting testimony. The question in such case is whether the evidence of recantation which is presented is of such a character and weight as to justify this court in setting aside the judgment entered upon the verdict of the jury." *People* v. *Shilitano,* 218 N. Y. 161, syllabus.

In a sense Sorro's perjury against Cohen has been established in Cohen's favor by the verdict of the jury at Sorro's trial. But I do not consider that verdict as binding on me in this application. Though it may not be lightly disregarded, it would be my duty to disregard it if, from my own investigation, I should become satisfied that the recantation of Sorro was not of such weight as to require me to grant the relief sought.

However, the application may not be denied because the evidence is not of such character and weight as to convince this court beyond a reasonable doubt that Sorro had committed perjury at the trial of Cohen. "Obviously, where the solemn judgment of a court is attacked and set aside, the burden of proof rests upon him who attacks it, and while, perhaps, he

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should not be required to prove his case beyond a reasonable doubt, he should prove it by preponderance of evidence." *People* v. *Giordano,* 106 Misc. Rep. 235, 238.

The jury which convicted Sorro were convinced, and rightly, as I believe, beyond a reasonable doubt that he had committed perjury in his testimony at the Cohen trial. While that was the test to which they had to subject the evidence against Sorro, it does not point out the test to be applied here. I am to consider the evidence of the recantation, including all the circumstances relating to it, those in the case against Cohen, those in the case against Sorro and the surrounding circumstances. Thus the weight to be accorded to the recantation is to be determined. Is it entitled to little or no weight because it is merely a step in a scheme to free Cohen, or for some other reason? Or, in the main, does it represent a sincere effort by Sorro to tell the truth? In his recantation he went over a broad field. It is evident that he might have told the truth in parts, and, for reasons of his own, suppressed it in other parts, as he did in his first statement about the bomb when he shielded the boy who went with him to locate Baff's house. The verdict against Sorro is not binding on me, because what convinced a jury beyond a reasonable doubt might not convince me at all. So, also, if the verdict had been in Sorro's favor, it would not have been binding on me.

I am to consider the evidence referred to not to ascertain whether Sorro was proved guilty of the perjury, but merely to determine whether, being governed by the preponderance of the evidence, it would be right or wrong for me to deny a new trial to Cohen.

The consideration of this matter divides naturally

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into two parts. The first relates to the importance of Sorro's testimony in the case against Cohen. The second relates to the effect of his recantation on that testimony.

Cohen was indicted with several others. While the indictment simply charged them with the murder of Baff, the theory of the prosecution was that they had conspired to and did procure others to shoot him. In fact the People contend that there was a conspiracy long before those concerned planned for his death. The proof against the defendants who were tried on the indictment for murder was to the effect that these conspirators and others desired at first merely to frighten Baff in the hope, apparently, that he might refrain from "overcropping" and other vicious practices in which they thought he indulged, his competition being ruinous to them in various branches of the poultry business. A bomb was set on the porch of his residence at Arverne. A market in which he appeared to be interested was burned. Persons had been employed to prepare and mail threatening letters and horses were poisoned. Finally, the People charged, Cohen and others decided that Baff should be killed. Various gunmen were procured and several plans were tried by them. Eventually Baff was shot in an open and busy market on a particularly busy day by two assassins, who escaped in a waiting automobile.

It is important to note that, according to the theory of the People in the Cohen case, there was no conspiracy to kill until after the time when the bomb had been placed on the porch of Baff's house. For two reasons is it important now. In the first place those who were concerned in that crime and not in the subsequent crimes against Baff were not accomplices to the murder. Secondly, without proof of par-

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ticipation by Cohen in the events subsequent to the placing of the bomb he could not have been convicted of the murder, though evidence of his participation in the entire chain of acts referred to, including the bomb incident, was relevant to the issue at the Cohen trial.

Before Cohen had been indicted one Arichiello and one Ferrara were separately tried, convicted and sentenced to be executed for the murder of Baff. Ferrara had confessed to being the driver of the car in which the gunmen escaped and Arichiello confessed that he was one of the assassins. Notwithstanding that each denied his confession, both were convicted.

Eventually Sorro was arrested and confessed to having placed the bomb, assisted by one Frank Burke and a man named Nino. Sorro and Burke made statements which, if true, involve Cohen in that crime. Cohen, it is said, acted principally through one Cardinale, whose story ultimately became the basic section of the proof on which Cohen was convicted.

When Sorro confessed to having placed the bomb Cardinale was in Italy. He had gone there in August, 1915, and had been drafted into the Italian army. In the chain of evidence being forged around Cohen Sorro's evidence was a most important link at that time. He was in custody, whereas Cardinale was overseas, in the service of his native land, a country which would not surrender him for trial.

Eventually, however, Cardinale was brought here on a stipulation that he would be returned to Italy within a stated time and that he would not be subjected to prosecution in this country.

At the Cohen trial Cardinale told a story of all the crimes against Baff referred to above. In each

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instance he took a part in procuring some one to commit the crime, and, as he testified, always at the behest of Joseph Cohen, who paid the price of the person hired to commit it.

Cardinale's story was amply sufficient to make a complete case against Cohen for the murder of Baff, excepting for the requirement of section 399 of the Code of Criminal Procedure that there could be nc conviction without corroboration, from one who took no part in the murder plot, tending to connect Joseph Cohen with the commission of the crime.

Most essential for this purpose was Sorro's testimony. As already stated, he told of Cohen's connection with the bomb placing and, far more important, of a conference about a year before the murder in the Harlem chicken market of Cardinale and Jacobs, attended by the defendant Joseph Cohen, Jacob Cohen and David Jacobs and by Cardinale and one Ippolito Greco, who, as Cardinale had testified, was then and there procured to kill Baff or have him killed. Sorro's story was that they stood in a little group and discussed the matter while he was in and about the market and heard parts of the conversation, including a statement by Joseph Cohen that he "wanted" to pay $500 to have Baff killed. Sorro's testimony in reference to this Harlem meeting was also to the effect that, in the presence of Cohen and of Jacobs, Cardinale asked him to go for Greco, and that he did go to a nearby soloon conducted by Greco and called him to the meeting.

In all this he was but repeating substantially a part of Cardinale's story. But corroboration was essential, and it was for the giving of this very testimony about this meeting in Harlem that Sorro was convicted of perjury.

It tended to connect Cohen with the commission

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of the crime of murder, and Sorro was held not to be an accomplice in the murder plot. The testimony was that he refused to take the part in the murder suggested to him by Cardinale. He knew of the plot and that it was progressing. He even took a small part in it by so calling Greco, but without becoming a participant in it. Accordingly Sorro was held not to be an accomplice. This was a close ruling. It is only fair to Cohen to say that it might not have been made if other testimony, corroborative of Cardinale, had been as important as that of Sorro relating to the Harlem murder plot meeting. By this I do not mean to challenge the correctness of that ruling or to intimate that it was unfair to Cohen, but merely that there would have been no occasion for it if there had been other testimony equally as important as Sorro's in directly implicating Cohen in the murder and satisfying the requirement of section 399 of the Code of Criminal Procedure. The fact that this ruling was made and that it was referred to in the opinion in the Court of Appeals as the most serious of all the errors alleged on behalf of Cohen (*People* v. *Cohen,* 223 N. Y. 406, 424) indicates the importance of Sorro's testimony against Cohen.

There was other testimony from persons not concerned in the crime of murder which might possibly be considered to corroborate Cardinale's story and to implicate Cohen in that crime. But there was none which at all approached Sorro's in satisfactorily meeting the requirement of the statute referred to above. Certainly none so directly implicated Cohen in the murder. Indeed there might be grave doubt as to whether any testimony other than Sorro's was sufficient, under the statutory requirement of corroboration, to implicate Cohen.

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Burke told of his part in the bomb placing and of two meetings with Cohen and the others concerned. His testimony, if true, implicated Cohen in that crime. But, as pointed out above, Cohen could not have been convicted of the crime of murder if his participation in the crimes against Baff had ended there. Furthermore, if the bomb plot had been an integral part of the murder plot, both Sorro and Burke would have been accomplices, but, as already stated, the ruling was to the contrary. This reasoning is also applicable to the three meetings attended by Romano and to the letter written by Burke to Cohen, as well as to Cohen's admissions and denials in relation to them.

The testimony of Joseph Cohen himself, on cross-examination, was exceedingly damaging to him. It leaves one outstanding impression — that of a guilty conscience. And of this the prosecution took full value in summing up.

There were numerous matters which tended to work against Cohen, such as his associations, motive for the crime and two events in his past — an assault for which he was imprisoned while he was a boy and his attempts to become a member of the police force of this city, in connection with which he had sworn falsely as to his age and name. Wherever any of these matters tended to work against him he was ready with his denials. In some instances he retracted the denials when confronted with written records which could not be successfully contradicted. But in others, especially when the murder itself was approached, he persisted in denying records which, apparently, were unimpeachable.

Particularly was this evident in connection with his denial that he saw Baff's body before it was removed from the market. In this denial Cohen per-

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sisted to the end, though he had been examined shortly after the murder, and then, according to the stenographer's notes, stated that he saw the body at one of the stands in the market and described in detail where and how it was lying, the surrounding crowd of spectators and other circumstances.

He also contradicted a witness who swore that he saw him peering at the body over a low door or other obstruction, as well as witnesses who testified to conversations with him immediately after the shooting. So also as to witnesses whose testimony tended to show motive or that he had expressed himself as against Baff even to the point of having him killed. Likewise as to records and other evidence which indicated that he had been treasurer of an association of persons having business around the market which seems to have been opposed to Baff and his practices, there having been testimony that Cohen had intimated that moneys which he is alleged to have paid at various times as the price of violence against Baff came from others, from an association. In fact the summation for the People openly charged that there were others "higher up" besides Cohen.

Cohen's testimony at his trial that he practically never went to the market of Cardinale and Campo is hard to believe. And at one time, long before his trial, he was in doubt whether he had seen Sorro there.

The opinion in the Court of Appeals, where one judge dissented from the affirmance of Cohen's conviction, states that a review of the case, "including Cohen's own statements and denials, shows that there is ample evidence" in the nature of corroboration of the statement of Cardinale that Cohen instigated the killing. 223 N. Y. 406, 426. This reference to Cohen's statements and denials as being

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corroborative of Cardinale has given me serious pause.

In the same opinion there are several expressions which indicate that, on the entire record, the jury might have found reasonable doubt as to Cohen's guilt, though the gist of the affirmance seems to be that Cohen was apparently guilty. At page 423 it is stated that a question of guilt was presented "which could only be solved by a jury." Reference is made more than once to the dangerous type of criminals who were the main support of the prosecution, and the court rests on the statement at page 422 that "there is no absolute safeguard against mistake or perjury. A high degree of probability is all that we can expect."

Again, as bearing favorably on the application, it must be conceded that Cohen's conviction rests on Cardinale's story. If his testimony "is rejected as unworthy of belief the prosecution must fail." *People* v. *Cohen*, 223 N. Y. 406, 412. At the same place it is stated that "Cardinale is a self-confessed criminal of a dangerous and vicious type." He was in a most unusual position of advantage to further any motive he may have had in bringing about Cohen's conviction. He was in this country under an agreement with the government of Italy which rendered him immune to prosecution here and which apparently left him free to testify or not as he himself desired. At Cohen's trial he did refuse to tell the names of the assassins who, according to his version, did the shooting. He also refused to answer other questions. He was not subject to fear of punishment, at least in this country, for perjury or for any crime in which he had been involved, even for murder. Nevertheless he was held to be a competent witness. As pointed out by the Court of

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Appeals, he may have advanced his own interests by bringing about Cohen's conviction. It appears also that Arichiello, Gagliano, Rosenstein, Sorro and others went free after Cohen's conviction. Motive for Cardinale's giving testimony to connect Cohen with the murder would not be difficult to conceive.

Furthermore, Cohen made no admissions which can be said to admit participation by him in the murder plot to which Cardinale testified. It is not clear that Cohen's denials, such as they are, and considering them in full detail, are to any appreciable extent corroborative of Cardinale's story. So far as they go, the denials are almost entirely denials of everything which might tend to be corroborative. Assuming, in view of his cross-examination, that he was lying, nevertheless they are denials and not admissions.

But I give this statement in the opinion of the Court of Appeals its greatest weight against Cohen on the present application. See, also, *People* v. *Becker*, 215 N. Y. 126, 140, 142. Doing so, it nevertheless remains a fact that there is no testimony comparable with Sorro's in meeting the requirement of section 399 of the Code of Criminal Procedure. Burke did not pretend to go further in time and event than the bomb setting. Sorro brought the murder home to Cohen not by inference, but by direct connection in fact. If his testimony of the meeting at the market of Campo and Cardinale is not false, Cohen must be guilty, for it leaves no room for any other conclusion.

Inference is the outstanding feature of all testimony other than Sorro's tending to connect Cohen with the killing of Baff, leaving out the testimony of those concerned in the murder plot and its execution. So also as to Cohen's own testimony. However

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strongly it may leave one impressed with a feeling that he had much to conceal, only by inference does it point to his guilt. Its effect on the jury may have been decisive. But, assuming that Cohen's testimony could be accepted in lieu of corroboration under said section 399, it has not the direct and necessarily conclusive effect of Sorro's testimony as to the Harlem meeting if we give full credence to Sorro.

Much of the testimony damaging to Cohen, including his cross-examination, related to events following the murder and tended more to show a guilty conscience than, by proof of word or deed of his in furtherance of the murder plot, to implicate him. Not so with Sorro's testimony. The importance of his testimony is indicated by the charge of the court and summation for the People at the Cohen trial. The part of the charge relating to Sorro's testimony covers sixteen folios of the printed case on appeal, or over one-tenth of the main charge of fifty-two pages. In the summation, at folio 7965, we find that the jury was told by counsel for the People: "Cardinale is an accomplice and Sorro has nothing to do with it except that he was there and heard what was said — if you believe Cardinale and Joe Sorro, and if you are convinced that they are telling the truth, that evidence, the court will charge you, is sufficient to convict in this case."

One piece of testimony emphasized by the prosecution, as tending to corroborate Cardinale and implicate Cohen, indicates by contrast the importance of Sorro's testimony. Cardinale had testified to a conversation in the yard of Cohen's house and he described the yard as having flowers in it. On cross-examination Cohen admitted there were flowers in the yard. That was but a very weak thread compared with the strong link forged by Sorro in his testimony about the Harlem meeting.

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Thus it will be seen that an analysis of the record in the Cohen case confirms the view of the attorney-general that "Sorro's evidence was sufficiently important so that if it was false and perjured Cohen should be granted an order for a new trial." As to the law in this situation see *People* v. *Shilitano*, 218 N. Y. 161; *Benfield* v. *Petrie*, 3 Doug. 24; *Great Falls Mfg. Co.* v. *Mathes*, 5 N. H. 574; *Horne* v. *Horne*, 75 N. C. 101; *Dennis* v. *State*, 103 Ind. 142, 147.

We come to the second point, the weight to be given to Sorro's recantation.

The jury which heard the case against Sorro has found, I repeat, that his testimony about the meeting in the Harlem market was perjured. As a result he has entered upon a long term of imprisonment. Independently of that verdict, however, I have considered the entire record in the case of *People* v. *Sorro*, as well as the stenographer's transcript of his recantation, his reaffirmance of it in his deposition taken at Baltimore, and his later statement at New York in which he said his recantation was false. I have reached the conclusion that the recantation was made in good faith and that it entitles Cohen to a new trial.

Although it means added length to a long opinion, I deem it proper, in view of the importance of the case, to indicate my reasons for so concluding. But first I desire to note that this conclusion as to Sorro and his testimony makes it unnecessary for me to conduct an original inquiry, under section 465 of the Code of Criminal Procedure, subdivision 7, by hearing the witnesses anew as to the fact that he did recant or as to when he told the truth. His recantation is, as stated, evidenced by the stenographer's transcript thereof, signed and sworn to by him. It was fully admitted by him at his trial. The record of that trial satisfactorily demonstrates to me that, in the main,

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he made it in a spirit of sincerity and truthfulness. Under the circumstances there is no occasion for further hearings.

As Cohen's participation in Baff's murder was charged to be a part of a conspiracy, so also has Sorro been convicted of perjury as part of a conspiracy. Briefly stated, the theory of Sorro's guilt is that he gave false testimony against Cohen as a result of a conspiracy to get Arichiello out of prison and to relieve others who might be subjected to prosecution on the charge of murdering Baff.

Reference has been made to the return of Cardinale from Italy. Before his arrival counsel had been obtained for him, a lawyer who had taken up Arichiello's case after his conviction for the murder, and who was also counsel for one Gagliano, an uncle of Cardinale's wife, who had been indicted for the murder before the conviction of Arichiello. It was charged at Sorro's trial that one Musica, who had associated himself with the lawyer referred to and who had previously assisted the district attorney and the attorney-general in the investigation of the Baff murder, conspired with Cardinale and others to the end stated. He, it is asserted, is the one who induced Sorro to commit perjury.

It is said that Cardinale's first statement after his return to this country was made to Musica, Cardinale having refused to talk before seeing his relatives here, who had retained counsel for him; and that, though the statement to Musica was taken down by a stenographer, neither the notes nor a copy of the statement can be found. The implication is that Musica desired, and ultimately obtained, a different statement — one calculated to serve the purpose of putting Cohen in prison, in the death house, and of getting Arichiello out. These features of the case

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against Sorro cannot be avoided in any consideration of the probabilities bearing upon the good faith of his recantation. So far as possible, however, I have considered the question here apart from the alleged conspiracy on which the prosecution of Sorro rested.

In the month of January, 1919, a year and one-half after Cohen's conviction, Sorro called on the district attorney, stated that he had lied in his testimony against Cohen and indicated a willingness to set matters right. He was subjected to an extensive examination, occupying numerous sessions on three or four different days running over a period of a week. This deposition, transcribed in question and answer form, covers seventy-five full pages. It is an exhibit in the Sorro case and has been referred to herein as his recantation. It indicates that as a result of the conspiracy referred to he deliberately committed perjury in important parts of his testimony against Cohen. For present purposes only his testimony of the meeting in Harlem need be deemed material. According to the recantation no such meeting ever occurred within his knowledge.

Sorro was in the service of the United States when he recanted, and shortly thereafter we find him in that service near Baltimore. He was located there by a representative of the attorney-general of this state, and examined by the lawyer who had been in charge, as special counsel appointed by the attorney-general, of the prosecution of Cohen and those tried with him. This was about two weeks after he had completed his recantation in the district attorney's office, and the statement he made was still to the effect that he lied against Cohen. The examination at Baltimore embraced a line of questioning somewhat different from that adopted by the representative of the district attorney. It was extensive, the transcript cover-

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ing 130 pages of two folios each. But a week thereafter he was examined in New York by another lawyer, who also represented the attorney-general in the prosecution of the case of *People* v. *Cohen and Others*. On this occasion he said he lied when he recanted, and in this story, retracting his recantation, he has persisted. Nevertheless he has been convicted of perjury as above stated.

When Sorro came to the district attorney and made his recantation it appears that his expressed reason therefor was a desire to right the wrong he had done, as Cohen was then under sentence of death. When Sorro was tried for perjury, Cohen's death sentence having been meantime commuted to life imprisonment, he said he had been hounded and frightened by persons working in the interests of Cohen until he finally decided to endeavor to help him by going to the authorities and falsely stating that he had lied against him.

Sorro's story at his own trial was that after the Cohen trial he was drafted into the service of the United States; that he was from time to time spoken to by others in and out of the service who annoyed and worried him by reason of his having testified against Cohen; that he was eventually attached to a war plant in Long Island City, apparently as a motor truck driver; that he went to his own home at night, arriving there at irregular hours, between seven and ten o'clock; and that one night on his way home he was accosted by two strange men whom, even in his own defense at his trial, he was unable to name or even describe. He says these two strangers, though they did not make appointments to meet him, continued to accost him on subsequent nights while he was going home until they had met him some ten times, and that they concocted for him and taught him to tell the story which constitutes his recantation. According to his latest story, their actions must have been part of a

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concerted offensive against him, joined by at least one of those who, as he asserts, had been hounding him, one who, as he states, was a partner of a brother of Cohen. After threats and promises of large sums of money, he says, he was put in connection with a brother-in-law of Cohen and with the lawyer for Cohen. But when he first retracted his recantation the details as to the pressure brought on him to recant, as to the persons involved and as to the alleged promises of money therefor, varied from the recital of the same matters at his trial.

That he was taken to the district attorney's office by Cohen's lawyer is true. But it is likely that Sorro was sent to him because he desired to recant, the lawyer being expected to know how he should go about it.

The story of the two strange men who managed to meet him in the streets ten times on cold winter nights, when, as Sorro said, the weather prevented long interviews, and to coach him for his recantation, is too shadowy and flimsy for belief. When it is remembered he was on trial for a serious crime this explanation fails to create an impression that it is truthful. Its effect is to strengthen rather than to weaken the recantation.

A study of the various statements made by Sorro, in the light of all the circumstances, brings out many things favorable to the view that in the recantation he adhered more closely to the truth than he did at Cohen's trial or at his own.

For example, in his first statement of the bomb matter, he did not say, as he did at Cohen's trial, that he had seen and talked to Cohen about setting the bomb before he placed it on the porch of Baff's house. In this respect he changed his story, thereby making it somewhat worse as against Cohen.

Another instance relates to the meeting in the Har-

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lem market. When first arrested in the bomb matter he appears not to have mentioned it. Again, up to the end of the Cohen trial it seems that he had spoken of only one meeting in that market between those whom, according to his testimony, he had heard plotting Baff's death. Later on he referred to several such meetings. Here again it is possible to find a studied effort to injure Cohen. Had there been not only one but several such meetings in his presence, would it have been believed that he was not concerned as an accomplice in the murder plot? Furthermore, the circumstances of the Harlem meeting, as told by Sorro at his own trial, make it very doubtful that he could have heard such a conversation while he was going about the market attending to other matters. And it is not likely that Cardinale would have asked him to stay around that night merely to send him a short distance for Greco; for a man of Cardinale's guile would feel the need of keeping a plot to commit murder as secret as possible.

In some details the recantation itself is seemingly untrue. In his statement of what happened on the night of his arrest and his reasons for falsely, according to his recantation, implicating Cohen in the bomb setting, he is contradicted as to important details by a representative of the police and a representative of the district attorney of Queens county.

But after a consideration of the whole record in the case against Sorro and a study of his testimony and that of Cardinale at Cohen's trial, considering as well the nature of the Harlem meeting and all the circumstances brought out in both cases, including the fact that the indictment against Sorro in Queens county for placing the bomb was dismissed before he recanted, I am left with the impression that Sorro was, in the main, endeavoring to tell the truth when

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he was making his recantation. In my opinion, therefore, according to a preponderance of the evidence, Sorro did give perjured evidence against Cohen.

Attention has been called to the difficulties which will confront the People of the State of New York in an effort to bring Cohen to trial again if this motion is granted unconditionally, the suggestion being that the ultimate probable consequence of such a decision will be to set Cohen free. It would of course be regrettable, assuming him to be guilty, that Cohen should escape the penalty of his crime. But, on the other hand, it would be even more regrettable if, being innocent, as under the law he is deemed to be until his guilt is established, he should be compelled to spend the remainder of his life in prison. He has already been confined in state's prison for a period of over four years, two of which he spent in the death house awaiting execution, following a conviction which I believe was based on perjured evidence.

A minute examination of the record of Sorro's trial satisfies me that a reversal of the judgment of conviction as against the evidence or on the grounds of passion or prejudice is not within the bounds of probability. If, which is always possible, there should be a reversal on alleged errors of law it would not affect the merits. To comply with the request of the attorney-general would be not only to act without legal warrant, but also would be to withhold from Joseph Cohen the relief which, in my opinion, he is unquestionably and unconditionally entitled to at this time.

At least two beings in the universe, and possibly no more, know absolutely whether Cohen is guilty or innocent of this murder — his Maker and Cohen himself. How that question is to be determined, or whether it can be determined by any human tribunal,

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are matters involving considerations which are extraneous to the record and which must be left to the future.

The efforts of society to protect itself against its enemies by measures to prevent or to punish crime are usually controlled in our law by principles adopted for the purpose of safeguarding the individual. This is inevitable where freedom is paramount. Occasionally section 399 of the Code of Criminal Procedure may become a stumbling block in the path of justice, an obstacle in the way of the prosecution which can be neither removed nor surmounted. But the wisdom of that statute is firmly based on the maxim that it is better that ten guilty men shall go free than that one innocent man shall be punished, a working principle which will probably abide with us as long as crime itself.

We are frequently reminded that the law at best is only a human effort towards absolute justice, a fact which is emphasized by the opinion of the Court of Appeals in this very case. Diligent and in a measure successful efforts have already been made by their representatives to vindicate the People of the State of New York by bringing to book the perpetrators of this notorious crime. If those efforts are destined not to be entirely successful in this case, it will be borne in mind by the People of the State of New York that human judgment is not infallible and that their courts are called upon to render not absolute justice, but justice under the law — the institution left to us by the experience of man through the ages as the safest basis of legal action.

The motion will be granted.

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ALBERT STERN, Appellant, *v.* LEO G. FROMAN and Another, Respondents.

(Supreme Court, Appellate Term, First Department, October Term — Filed December, 1921.)

Brokers — real estate — contract for division of commissions — "commision" includes money received for procuring purchase of option — judgment directed by appellate court where retrial is useless formality.

In the administration of justice less regard should be had for the lexicon definition of a word and more for what the parties understood the word to mean.

An agreement between plaintiff and defendants, all real estate brokers, for a division of commissions earned from any real estate transactions in which they were jointly interested, provided that upon any sale of real estate wherein plaintiff had procured the purchaser, he was to receive fifty per cent of the commission. Plaintiff having brought to defendants an intending purchaser of certain premises, one of the defendants undertook to consummate the sale himself, and in the course of investigation learned that another firm of brokers had an option to purchase the property his customer wanted, and he finally arranged for the purchase of the option by his client at a certain price, for which services the seller of the option paid defendant a certain sum of money, but this fact was never disclosed to plaintiff. *Held,* that the money paid to defendant for the sale of the option was a "commission" just as much as the sum paid by the owners of the property to the brokers upon the sale, which was divided between plaintiff and defendant.

It was error, therefore, so far as related to plaintiff's claim to recover one-half of the money so paid to defendants, to dismiss the complaint on the ground that the money thus earned was not within the terms of the agreement, and the judgment rendered in favor of defendant will be reversed, with costs, and as it would be a useless formality to order a new trial, judgment is directed in favor of plaintiff for the full amount claimed, with interest and costs.

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APPEAL by plaintiff from a judgment rendered in the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of defendant.

Mark, McKiniry & Baum (Charles Fredericks, of counsel), for plaintiff, appellant.

Benjamin Berger, for defendants, respondents.

WAGNER, J. The plaintiff and defendants, all real estate brokers, entered into an agreement by the terms of which they were to divide commissions which were earned from any real estate transactions in which they were jointly interested. The commissions were to be shared fifty per cent to plaintiff and fifty per cent to defendants, upon any real estate sale wherein the plaintiff had procured the purchaser. The other terms of the agreement it is not necessary to consider because they are not involved in this controversy.

It appeared that the plaintiff brought to the defendants a proposed purchaser for certain premises situated in this city. One of the defendants took upon himself the task of consummating the sale of the property the customer desired to purchase. In the course of his investigation this defendant learned that another firm of brokers had an option upon the houses his customer wanted. He then began to negotiate with the said firm of brokers for the purchase by his customers of this option so as to clear the path and be able to deal directly with the owners of the property. He finally arranged with the holders of the option for the purchase of the same by his client for the sum of $1,700 for which services the seller of the option paid him (the defendant) the sum of $741.50. The defendant having this matter in charge never disclosed to the plaintiff the receipt of this

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compensation, profit or commission, whatever it may be termed, and of course never shared this commission with plaintiff.

Plaintiff brought this suit to recover one-half of this commission, hitherto undisclosed, paid to defendants upon the sale of this option. The court below after testimony was adduced as here related determined that the moneys thus earned were not within the terms of the agreement between plaintiff and defendants and dismissed the action so far as it related to this particular claim. This action by the court, we think, was error. The moneys paid to the defendants were earned in a transaction incidental to the main transaction in which the plaintiff under the agreement had a direct interest because he had concededly procured the customer who bought the option. The court below adhering to the literal meaning of the words of the agreement concluded that the moneys paid to defendant by the seller of the option could not be termed "commission" and as the agreement between the parties used the word "commission" the plaintiff was excluded from any participation in this bonus or profit, or whatever it may be termed. This is too abstract an interpretation of the word "commission" and is clearly at variance with what the parties themselves intended and understood.

Broadly viewed, mindful of the circumstances surrounding the making of the agreement, the nature of the business, and bringing common sense to our aid the moneys paid to the defendants for the sale of the option was a commission just as much as the sum paid by the owners of the property to the brokers upon the sale, which latter commissions concededly were divided between plaintiff and defendants.

As has been said before: "The law has outgrown its primitive stage of formalism when the precise word

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was the sovereign talisman and every slip fatal." *Wood* v. *Duff-Gordon*, 222 N. Y. 88, 91.

In the administration of justice we should have less regard for the abstract lexicon definition of the precise word and more for what the parties understood it to mean. Since the defendants admitted on the trial the payment to them of this money by the seller of the option out of the purchase price of the option, and since we are convinced under the agreement between the parties that plaintiff was entitled to fifty per cent of the amount thus paid, it would be a useless formality to order a retrial of the action, and we accordingly direct that judgment for plaintiff be entered for the sum of $370.75, together with interest and costs.

Judgment reversed, with $30 costs to the appellant and judgment directed in favor of the plaintiff for the sum of $370.75 with interest thereon from the 19th day of June, 1915, and costs in the court below.

BIJUR, J., concurs. GUY, J., concurs in the result.

Judgment reversed.

HUDSON AND MANHATTAN RAILROAD COMPANY, Appellant, *v.* LAWRENCE S. MAYERS and Another, Respondents.

(Supreme Court, Appellate Term, First Department, October Term — Filed December, 1921.)

Landlord and tenant — landlord's election to terminate tenancy for substantial structural change or rebuilding — changes by subsequent lessee.

A lease provided that it might be terminated on or at any time subsequent to January 1, 1921, by mailing to the tenant a six-months' notice of the landlord's election to terminate the lease, "such right, however, to be exercised by the lessor only

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in the event of its intended substantial structural change or rebuilding of said premises." *Held*, that a notice given on December 3, 1920, of the landlord's election to terminate the lease on June 4, 1921, was sufficient, and a final order dismissing a summary proceeding against the tenant as a holdover will be reversed and a new trial ordered.

The fact that within a few days after the giving of the notice the premises were leased to a third party, which agreed with the landlord to make certain changes in the building, did not, as matter of law, deprive the landlord of his right to terminate the lease by the giving of the notice.

APPEAL by landlord from final order of the Municipal Court, borough of Manhattan, first district, dismissing petition in summary proceedings.

Jerome Eisner, for appellant.

Stoddard & Mark (Yorke Allen, of counsel), for respondents.

WAGNER, J. In this summary proceeding brought against the tenants for holding over after the expiration of their term the lease provides that "the lessor shall have the right to terminate this lease on January 1, 1921, or at any time subsequent thereto by mailing to the lessee at least six months before such termination date, a written notice to that effect, such right, however, to be exercised by the lessor only in the event of its intended substantial structural change or rebuilding of said premises."

On December 3, 1920, the landlord gave the tenants notice of its election to terminate the lease June 4, 1921, "because of our intention to make substantial structural change or rebuild said premises." Within a few days after the giving of the notice a lease of the premises was given by the landlord to a third party,

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which agreed with the landlord to make certain changes in the building. The tenants refusing to surrender possession the landlord instituted the summary proceeding, and the petition was dismissed by the trial court.

The dismissal was based on the grounds, *first,* that under the provision above quoted the landlord could not prior to January 1, 1921, serve a notice terminating the lease; and, *second,* that the landlord could not cancel the lease because a subsequent lessee desired to make alterations in the premises.

The learned trial judge was in error in holding that the notice was insufficient, for it clearly appears from the lease that it could be terminated on January 1, 1921, or at any time subsequently by at least six months' notice given before such termination date.

As to the second ground of the dismissal, the essential allegation of the landlord's petition was its intention to make substantial structural change in or rebuild the premises. The intention of a lessee under a lease made after the service of the six months' notice would be unavailing here, for this proceeding was not and could not be brought on an intention formed by one other than the lessor after the giving of the notice. It is, therefore, unnecessary to determine whether under the covenant of the lease a subsequent lessee could have recourse to the provision therein for its termination prior to the expiration of the specified term. If the lessor, the petitioner herein, at the time of the giving of the notice had the intention of making substantial structural changes in or to rebuild the premises, his election could not be defeated merely because he desired to make those changes through the instrumentality of a subsequent lessee rather than directly by a contractor. The method of carrying out this work — whether by the lessor or by a subsequent

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lessee — would be proper for consideration by the jury as throwing light on the good faith of the landlord as to his alleged intention, but should not as matter of law deprive the lessor of the benefit of the covenant.

The landlord's counsel endeavored to show the intention of the lessor at the time of the giving of the notice to make structural changes in the building; but the objections of the tenants' counsel to such evidence were sustained by the trial court over the appellant's exceptions, for the reason apparently that the subsequent lessee had agreed to make the alterations. This was error to the prejudice of the petitioner.

Final order reversed and new trial ordered, with thirty dollars costs to the appellant to abide the event.

GUY and BIJUR, JJ., concur.

Order reversed.

LOUIS KAHN, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 16628.

(Court of Claims, December, 1921.)

Torts — claims against state — Court of Claims — jurisdiction — damages — prison inmate — immunity of state from liability for torts of its agents is not relinquished by a statute waiving notice of claim — Laws of 1920, chap. 726.

Claimant, an inmate of Clinton prison, while at work in the weave shop was injured by being caught in a moving pulley on which he was attempting to adjust a belt under the direction of the person in charge. *Held*, that while by the statute (Laws of 1920, chap. 726) conferring jurisdiction only upon the Court of Claims to hear and determine the claim for damages, the state had clearly waived its immunity from suit and the

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due filing of a notice of intention, this was not in and of itself sufficient to substantiate the claim in view of the expressed declaration of the statute that facts establishing liability on the part of the state must be proved as a condition precedent to the making of an award.

Claim dismissed for failure to state facts sufficient to constitute a cause of action.

MOTION to dismiss claim upon the ground that the claim does not state facts sufficient to constitute a cause of action.

Porter L. Merriman, deputy attorney-general, for the motion.

J. John Schulman (Louis Silberman, of counsel), for the claimant in opposition.

CORWIN, J. This claim is filed pursuant to chapter 726 of the Laws of 1920 and is for injuries suffered by the claimant while an inmate of the Clinton prison, alleged to be the result of the negligent acts of an agent and employee of the state and without contributory negligence on the part of the claimant.

That the state is immune from liability for injuries arising from the negligence of its officers and agents, in the absence of constitutional or legislative enactment assuming such liability, is well settled. *Smith* v. *State of New York,* 227 N. Y. 405; *Lewis* v. *State of New York,* 96 id. 71; *Sipple* v. *State of New York,* 99 id. 284.

It is urged in behalf of the claimant, however, that by the enabling act above referred to and which is pleaded in the claim, the state assumed liability. The language of the act, so far as is material, is as follows: "Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the

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alleged claim of Louis Kahn against the State alleged to have been sustained by him by reason of the negligence of the State and its employees while confined in Clinton Prison on the fourteenth day of February, nineteen hundred and nineteen; and while at work in the weave shop in attempting to adjust a belt on a moving pulley under the direction of the person in charge, and being caught therein and permanently injured, causing the amputation of the left arm above the elbow; which such injury was caused solely by reason of the negligence of the State and its employees, and not through any contributory carelessness or negligence on the part of the claimant. The State hereby consents to have its liability in such claim determined, notwithstanding the failure of the claimant to file notice of intention to file such claim within the time limited by law therefor, provided the claim be filed with the court of claims within six months after this act takes effect. If facts establishing liability on the part of the State be proven to the satisfaction of the court, and the court deem it just and equitable that the claimant should be compensated by the State for such injuries it may determine the extent of such injuries and allow such claim in such sum as is deemed just and reasonable and render judgment therefor against the State."

By this act the state clearly waived its immunity from suit and waived the due filing of a notice of intention; but this is not in itself sufficient. "The immunity of the state from liability for the torts of its agents is based upon the broad ground of public policy and it is not waived by a statute conferring jurisdiction only. In the absence of a legislative enactment specifically waiving this immunity, the state cannot be subjected to a liability therefor." *Smith* v. *State, supra.* The state by the act in ques-

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tion not only failed to assume liability under the facts stated, but expressly provided that facts establishing liability on the part of the state must be proved as a condition precedent to the making of an award.

To enable the claimant to recover, the legislature must in effect create a new cause of action in his favor based upon the facts recited in the statute. *Litchfield* v. *Bond*, 186 N. Y. 66, 83. That the legislature may do this without exceeding its constitutional limitations is indisputable. *Munro* v. *State of New York*, 223 N. Y. 208; *Babcock* v. *State of New York*, 190 App. Div. 147. That it has not done so seems equally clear.

The claim must be dismissed.

ACKERSON, P. J., and SMITH, J., concur.

Claim dismissed.

In the Matter of the Transfer Tax upon the Estate of JOHN LYON, Deceased.

(Surrogate's Court, Westchester County, December, 1921.)

Transfer tax — evidence — residence — presumption in favor of an original as against an acquired domicile — burden of proof — property of decedent as non-resident subject to tax — Tax Law, § 243, as amended by Laws of 1919, chap. 629.

By virtue of section 243 of the Tax Law (Laws of 1916, chap. 551, as amended by Laws of 1919, chap. 629), the burden of proof in a transfer tax proceeding is upon those claiming exemption by reason of the alleged non-residence of their decedent, which declares that "every person shall be deemed to have died a resident and not a non-resident of the state of New York if and when such person shall have dwelt

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or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death."

Decedent, who was born at Greenwich in the state of Connecticut in 1839, died in the month of July, 1920, at Port Chester, New York, where he had continuously resided with his family since January, 1900, having acquired real estate there by inheritance. He never resided elsewhere than at either of these two places, both of which are not far distant from the boundary line dividing the states of Connecticut and New York. He was made a freeman in Greenwich in 1861 and continued to exercise his communal relations in Connecticut until 1913, always attending and taking part in the town meetings. He never voted elsewhere and in more than four hundred deeds, mortgages and other papers recorded in Greenwich, in Westchester county and Kings county, N. Y., he was always mentioned and described as a resident of Greenwich and he declined to receive or execute papers in which he was otherwise described, and furthermore he protested his assessments in Port Chester. No attempt was made by the state tax commission, in a transfer tax proceeding, to controvert these facts, established by the executor. *Held*, that the burden laid upon the executor by the statute has been met by evidence abundant and convincing, indicating an undeviating determination on the part of decedent not to abandon his domicile of origin in the state of Connecticut, either in law or fact, and that domicile must govern in the administration of his estate.

A contention on behalf of the state tax commission that a residence of years in another state in conjugal relationship supplies the intent to change a person's domicile and in fact creates a new domicile of choice for him without the operation of his mind, is untenable under the decision in *Dupuy* v. *Wurts*, 53 N. Y. 556–561.

The transfer tax proceeding remitted to the transfer tax appraiser in Westchester county, N. Y., to appraise the property of the decedent therein, as a non-resident under the provisions of section 243 of the Tax Law in force at the time of decedent's death.

TRANSFER tax proceedings.

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Lafayette B. Gleason (John B. Gleason, of counsel), attorney under designation of State Tax Commission, as in estate of non-resident.

Francis A. Winslow (Charles C. Fenno, of counsel), for State Tax Commission.

T. Ludlow Christie (Arthur R. Wilcox, of counsel), for executor.

Carlos S. Holcomb, for Tax Commission of State of Connecticut.

SLATER, S. In this taxable transfer proceeding the domicile of the decedent must be determined. It appears that an application was made by the executor to the surrogate of New York county for the appointment of an appraiser, upon the theory that the decedent was a non-resident, owning property in that jurisdiction. After hearing had before the transfer tax appraiser, it was reported by him to the surrogate, that a question relating to residence was primarily involved. Upon a hearing before the surrogate of New York county, the completed proceeding was transferred to this court for determination, by order dated October 25, 1921 (116 Misc. Rep. 640), upon the ground that, in the event it was found that the decedent was a resident of Westchester county, the court's jurisdiction would be ousted by force of section 45 of the Surrogate's Court Act, formerly section 2515 of the Code of Civil Procedure and section 228 of the Tax Law.

Upon the hearing before me, counsel stipulated that the testimony on the subject of residence already taken in New York county may be received by this court with the same force and effect as if the proceeding had been originally instituted in the county of Westchester.

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An inheritance tax is imposed upon the transfer of property within the state where the transfer takes place, which is the place of the domicile of the decedent at the time of his death. The term "resident," section 47 of the Decedent Estate Law, designates a person domiciled in the state, and in legal phraseology is synonymous with domicile. *People* v. *Platt,* 117 N. Y. 159; *Matter of Rooney,* 172 App. Div. 274; *Matter of Martin,* 173 id. 1, 3; *Matter of Harkness,* 183 id. 396; *Matter of Lydig,* 191 id. 117; *Matter of Blumenthal,* 101 Misc. Rep. 83; affd., 186 App. Div. 944; *Matter of Martin,* N. Y. L. J. Dec. 28, 1916; *Matter of Robitaille,* 78 Misc. Rep. 108; *Matter of Brooks,* 105 id. 559. In ascertaining the domicile of the decedent, two considerations must be kept in mind; that every person must have a domicile somewhere; that a person can have only one domicile for one purpose, at one and the same time. Everyone has a domicile of origin which he retains until he acquires another. *De Meli* v. *De Meli,* 120 N. Y. 485; *Dupuy* v. *Wurtz,* 53 id. 556, 562; *United States Trust Co.* v. *Hart,* 150 App. Div. 413; affd., 208 N. Y. 617; *Matter of James,* 221 id. 256; *Abington* v. *North Bridgewater,* 23 Pick. 170, 177; Jacobs Domicil, ¶ 114. Where the facts conflict, the presumption is strongly in favor of an original, as against an acquired domicile. A change of domicile is a proceeding of a serious nature. It determines his civil and political rights and privileges, duties and obligations. It furnishes the rule for the disposal of property.

Every case involving the question of domicile must stand upon its own peculiar circumstances, must be bottomed on its own facts. Consequently, we must look to the leading cases of this state to test the question of domicile arising in the instant case.

Before we attempt to solve the legal question as to

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whether the decedent acquired a new domicile of choice, either forced by law, or voluntary, let us first consider and decide whether it can be said that he abandoned his domicile of origin.

The facts are not disputed. John Lyon, farmer, died July 12, 1920, at Port Chester, N. Y. Since January, 1900, he had resided continuously at Port Chester with his wife and children. His domicile of origin was in Greenwich, Conn., where he was born in the year 1839. He was a descendant of one of the first settlers. The decedent never resided elsewhere than, first, on the farm where he was born, situate on Weaver street in Greenwich, Conn., and later on a farm located on King street, in the village of Port Chester, N. Y. These two places of residence, in an air line are about one and one-half miles apart, by the highway they are about three miles distant, with about an equal distance of either house from the boundary line dividing the states of Connecticut and New York. For convenience in transacting business in Greenwich, with present day conditions of highway and travel, either of these abodes offers equal opportunity.

The decedent married in Greenwich and reared his family there. Upon coming into a large inheritance, consisting of several farms and a large personal estate, he removed in 1900 to one of the farms on the then outskirts of Port Chester. The house upon this farm had been occupied by his deceased relative. It was a furnished modern farmhouse, containing conveniences. He visited his sister who lived in the old homestead on Weaver street until her death in 1910, sometimes passing the night, since which time the Weaver street house has been occupied by a caretaker. The decedent until his death worked the Weaver street farm with hired men and visited it several times a week. He was generally found there

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by his friends and attorneys. He was made a freeman in Greenwich in March, 1861, and continued to exercise his communal relations in Connecticut until 1913, always attending and taking part in town meetings. He never voted elsewhere. *Paddack* v. *Lewis,* 59 App. Div. 430, 434; affd., 179 N. Y. 591; *City of New York* v. *Beers,* 163 App. Div. 495. He was a director in two banks, one in Greenwich and one in Port Chester, from 1910 to 1913, inclusive, and upon qualifying as such director, had signed and sworn to solemn oaths in successive years that he was a resident of Greenwich. Deeds, mortgages and other papers, some four hundred and sixty-six in number, recorded in Greenwich, in Westchester county and Kings county, N. Y., show he was always mentioned and described as a resident of Greenwich. In fact, when such papers were presented for his signature, or his acceptance, if he was otherwise described, he repudiated them and declined to receive them, or to execute them.

In an affidavit verified August 21, 1900, submitted to the assessors of the town of Rye, the decedent states: "I am not now, and never have been, and was not between May 1st and July 1st, 1900, a resident of this Town, or of the County of Westchester. My residence is now, and always has been in the Town of Greenwich, State of Connecticut, and that residence I have never surrendered and have never taken up residence elsewhere * * *. Although at present living at King Street in the Village of Port Chester, Town of Rye, I have not intended to make it my residence or to surrender my residence in the Town of Greenwich. Having never been a resident of the Town of Rye, I object to the personal assessment mentioned."

In December, 1909, in relation to taxes in New York city, he swore that he was and still is a resident of

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Greenwich and has been such resident for many years. In certain tax proceedings against the village of Port Chester in July, 1918, he swore that he was a resident of Greenwich. In Port Chester he was taxed as a non-resident. In Connecticut he was taxed as a resident and made a return upon a resident blank. *De Meli* v. *De Meli*, 120 N. Y. 485, 491. His Federal income tax report was filed at Hartford, Conn., upon a resident form of blank, describing himself as a resident of Connecticut. From the testimony of his Connecticut attorney, it appears that he stated: "He had acquired property in Port Chester by inheritance, and there was a house over there and he was going to live there until he could dispose of the property, that he had no intention of changing his legal residence." That "the decedent said, the question of residence was a question of intent. If a man had a domicile in one place because he actually moved into the other State, he would not lose his residence until there was a change of domicile, that he was so advised by counsel." In his will dated March 31, 1913, he is mentioned as of Greenwich. The will was probated there July 30, 1920. *Matter of Mesa y Hernandez*, 172 App. Div. 467; affd., 219 N. Y. 566. Witnesses testified that he said to them in 1900, and later, that he "never intended to change his residence; that the motive in living in Port Chester was to occupy part of his inheritance and attempt to market it; that he spent a large part of his time in Greenwich." He kept his securities in a safe deposit vault in Greenwich. John Lyon was a Connecticut man by birth, tradition and by long years of residence. Several of the evidentiary facts here related were present in *Matter of Morgan*, 176 App. Div. 909, as stated in *Matter of Harkness*, 183 id. 396, 407.

In reviewing at length the multitude of evidence

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offered, both oral and written declarations, it is found that in every formal act of his life since 1900, where it became necessary for him to state his domicile, he invariably claimed it as the state of Connecticut, and not New York. Any of these recited acts, or declarations, standing alone may be of slight importance, none are conclusive, but grouped together, create the highest evidence of unequivocal acts, conclusively proving an intent to keep the domicile of origin. Together they are abundant and are an unvarying index of his intention. The proven acts are clearly contradictory of any intention to abandon his Connecticut domicile. These facts must be accepted as determinative of his intent. *City of New York* v. *Beers,* 163 App. Div. 495.

It may be said that prior to 1916 the burden of proof rested upon the party alleging a change of domicile. *Dupuy* v. *Wurtz,* 53 N. Y. 556, 562; *Matter of Newcomb,* 192 id. 238; *People ex rel. Blocher* v. *Crowley,* 21 App. Div. 304; affd., 155 N. Y. 700; *Matter of Gad,* N. Y. L. J. April 5, 1916; *Matter of Brooks,* 105 Misc. Rep. 559; *Matter of Horton,* 175 App. Div. 447; *Matter of Lydig,* 191 id. 117; *Matter of Tallmadge,* 109 Misc. Rep. 696. It may be that the burden still rests upon the party asserting another domicile. But, be that as it may, let us assume that, upon the authority of *Matter of Barbour,* 185 App. Div. 445; affd., 226 N. Y. 639, the burden of an intention to abandon a domicile of origin, which formerly rested upon those who assert it, no longer obtains in this state in a taxable transfer case (*Matter of Frick,* 116 Misc. Rep. 488, 491) by reason of section 243 of the Transfer Tax Law, being chapter 551 of the Laws of 1916, as amended by chapter 629 of the Laws of 1919, which says: "* * * every person shall be deemed to have died a resident and not a non-resident of the

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state of New York if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death * * *. The burden of proof in transfer tax proceedings shall be on those claiming exemption by reason of the alleged non-residence of the deceased * * *." This section was construed in *Matter of Barbour, supra,* as creating only a disputable presumption of residence, which may be overcome by the proof of the case indicated by the acts, conduct, and statements as to the intent of the decedent.

The burden laid upon the executor in the instant case by statutory law, in my opinion, has been met, overcome and destroyed by the evidence upon the record. It is abundant and convincing. It all indicated an undeviating determination — a plain intent. The cases of *Dupuy* v. *Wurtz,* 53 N. Y. 556, and *Matter of Newcomb,* 192 id. 238, 250, are the leading and foundation cases upon this subject in the state. Judge Rapallo in *Dupuy* v. *Wurtz, supra,* in referring to the elementary principles governing questions of domicile, says: "To effect a change of domicil for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicil, and acquire another as the sole domicil. Residence alone has no effect *per se,* though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicil. (*Hodgson* v. *De Beauchesne,* 12 Moore P. C. 283, 328; *Munro* v. *Munro,* 7 Cl. & Fin. 877; *Collier* v. *Rivaz,* 2 Curteis, 857; *Aikman* v. *Aikman,* 3 McQueen, 855, 877.) This rule is laid down with great clearness in the case of *Moorhouse* v. *Lord* (10 H. L. 283, 292), as

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follows: Change of residence alone, however long continued, does not effect a change of domicil as regulating the testamentary acts of the individual. It may be, and is, strong evidence of an intention to change the domicil. But unless in addition to residence there is an intention to change the domicil, no change of domicil is made. And in *Whicker* v. *Hume* (7 H. L. 139) it is said the length of time is an ingredient in domicil. It is of little value if not united to intention, and is nothing if contradicted by intention. And in *Aikman* v. *Aikman* (3 McQueen, 877) Lord Cranworth says, with great conciseness, that the rule of law is perfectly settled that every man's domicil of origin is presumed to continue until he has acquired another sole domicil with the intention of abandoning his domicil of origin; that this change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change." And again (at p. 569): "All the authorities agree that to effect a change of domicile, there must be an intention to do both" (abandon and acquire), and again (at p. 570): "A mere declaration of an intention not to return is not conclusive as to change of domicile." Judge Vann in *Matter of Newcomb, supra*, 192 N. Y. 250, states the law to be as follows: "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circum-

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stances, which differ as widely as the peculiarities of individuals. Less evidence is required to establish a change of domicile from one state to another than from one nation to another. In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. *Uno solo die constituitur domicilium si de voluntate appareat.* Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile. (*Dupuy* v. *Wurtz*, 53 N. Y. 556, 561; *The Venus*, 8 Cranch, 253, 278; *Carey's Appeal*, 75 Penn. St. 201, 205; Wharton's Conflict of Law [2d ed.], 21, 56, 66.) There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. The subject is under the absolute control of every person of full age and sound mind who is free from restraint, unless it may be that the domicile of a wife is controlled by that of her husband as long as she lives with him. (Story's Conflict of Law [7th ed.], § 46.) Subject to the qualifications named every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and

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acquire another and the acts of the person affected confirm the intention. (*McConnell* v. *Kelley*, 138 Mass. 372.) No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing, The *animus manendi* must be actual with no *animo revertendi*. A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged, but even if the residence was begun for a temporary purpose, intention may convert it into a domicile. When a new domicile has been actually acquired it does not necessarily revert, even if not followed by continuous residence. There may be many absences from the new place and protracted sojournings in the old, unless intention and residence unite again, when still another change of domicile is effected."

These principles, so clearly and succinctly asserted in these two leading cases, are affirmed and restated by Mr. Justice McLaughlin, now of the Court of Appeals, in *United States Trust Co.* v. *Hart*, 150 App. Div. 413; affd., 208 N. Y. 617. There the court says: "The fact that he resided in Paris most of the time from 1880, while important to be considered, certainly is not controlling, because domicile may exist without actual residence, but never without intention. (*de Meli* v. *de Meli*, 120 N. Y. 485.)" Residence means living in a particular locality, but domicile means living in that locality *with intent* to make it a fixed and permanent home. In order to acquire a new domicile, there must be a *union of residence and intention*. Residence without intention, or intention without residence, is of no avail, etc. *Matter of Roberts*, 8 Paige, 519; *Cruger* v. *Phelps*, 21 Misc. Rep. 252,

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261; 19 C. J. 393; *Duke* v. *Duke*, 70 N. J. Eq. 135; *Penfield* v. *Chesapeake R. Co.*, 134 U. S. 351, 357.

Residence and intention, *animus et factum*, go hand in hand. They must be both present to create the change of domicile. An intention to abandon the former domicile must appear. Either residence alone, or intent alone, is not sufficient. Gleason & Otis Inheritance Tax, p. 214; *Matter of Lydig*, 191 App. Div. 117; *Matter of James*, 221 N. Y. 242, 256; *Matter of Frick*, 116 Misc. Rep. 488; 19 C. J. 423, n. 39; *Plant* v. *Harrison*, 36 Misc. Rep. 649; *Frost* v. *Bristbin*, 19 Wend. 11. The naked residence in itself amounts to nothing, unaccompanied with evidence of the *animus*. *Isham* v. *Gibbons*, 1 Bradf. 69, 89. Long continued absence from the domicile is not an indication of abandonment so long as the *intention* to return exists. The length of residence elsewhere does not affect the change. *Matter of Blumenthal*, 101 Misc. Rep. 83; affd. without opinion 186 App. Div. 944; *Curtis* v. *Curtis*, 185 id. 391; *Matter of Harkness*, 183 id. 396; *Matter of Mesa y Hernandez*, 172 id. 467; *People* v. *Platt*, 117 N. Y. 159; *Matter of Chadwick*, 109 Misc. Rep. 696; *Matter of Frick, supra; Ætna National Bank* v. *Kramer*, 142 App. Div. 444. Mr. Justice Jenks of the Appellate Division of the second department in *Webster* v. *Kellogg Co.*, 168 App. Div. 443, also restates these principles.

We must gather a dead person's intention from his acts, his solemn statements and his conduct. It is a question of fact, and it is the court's duty to pass upon the facts as well as the law. Intention may be proved just as any other fact is proved by any relative evidence. *Matter of Seymour*, 107 Misc. Rep. 330.

Upon this point, the court in *Dupuy* v. *Wurtz*, says (at p. 562): "With respect to the evidence necessary

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to establish the intention, it is impossible to lay down any positive rule. * * * In passing upon such a question, in view of the important results flowing from a change of domicil, the intention to make such a change should be established by very clear proof." (Cases cited.) "The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are usually more reliable than oral ones."

And again, in *Matter of Newcomb, supra,* p. 252: "While acts speak louder than words, the words are to be heard for what they are worth." In *United States Trust Co.* v. *Hart,* 150 App. Div. 413, 417, referring to the character of evidence, the court says: "One's acts are always much more satisfactory as evidence of intention than his declarations, and *written declarations* are considered stronger than oral ones." "Declarations are primarily valuable as expressions of intention, but they are not controlling and are subject to be overcome by 'other and more reliable indications of the true intention.' * * * 'The time, occasion and manner of making them, the reasonableness and consistency with themselves and with the other proven facts in the case, the presence or absence of the suspicion of sinister purpose in making them enter materially into the estimation of their value.'" *Plant* v. *Harrison,* 36 Misc. Rep. 649, 669; Jacobs Domicil, ¶¶ 454, 455; *Sherwood* v. *Judd,* 3 Bradf. 267; *Peterson* v. *Chemical Bank,* 32 N. Y. 21; *Isham* v. *Gibbons,* 1 Bradf. 69; *Matter of Zerega,* 20 N. Y. Supp. 417; *Hitt* v. *Crosby,* 26 How. Pr. 413, 416.

In *Cruger* v. *Phelps,* 21 Misc. Rep. 252, 264, Justice Chase, later of the Court of Appeals, writes words that might well be used in the instant case. He says: "In deeds and other instruments executed by and to

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him, there is a uniform and unvarying reference to his residence in the city of New York. This statement is made in instruments prepared and executed in France and other parts of Europe, as well as in instruments prepared and executed in this country. Such designation in these papers was not the work of a draftsman, but the work of the testator. They present a continuous unequivocal and consistent statement of intention in solemn instruments, covering all the period in question. These statements were made when there was no controversy, and cover such a long period of time as to preclude the idea of their being made with reference to property rights, and they were so deliberately and frequently made as to preclude the idea of carelessness or inadvertence. To hold in the face of all these declarations that Mr. Pell intended to change his legal domicile is to brand him as a deliberate falsifier."

In *Matter of Cleveland*, 28 Misc. Rep. 369, the decedent had resided abroad for thirty-two years. Surrogate Varnum says: "It is clear, from the evidence, that the testatrix preferred living abroad after her husband's death for many reasons of habit, personal comfort and health, but I find nothing to satisfy me that she had any intention of giving up her residence and domicile in New York, even though she thought it probable that she might never return there to live, * * *." *Matter of Brant*, 30 Misc. Rep. 16.

The facts in the present case fully supply and indicate the decedent's intention to keep his domicile of origin in Greenwich, Conn. The acts are inconsistent with an intention on his part to change his domicile. The overt acts showing intent to keep the domicile of origin, with the utter lack of evidence showing an intent to abandon it, are not overcome or outweighed by mere residence here.

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The state tax commission strongly contends, as they have argued in other cases involving the question of domicile, that a residence of years in another state in conjugal relationship will supply the intent to change a person's domicile and, in fact, does create a new domicile of choice for him without the operation of his mind. That sometime after January, 1900, some unspecified time, the decedent changed his domicile to New York state. One day is recognized "sufficient, provided the *animus* exists." *Craigie* v. *Lewin*, 3 Curt. 435. Domicile by operation of law is that domicile which the law attributes to a person independent of his own intention. It is consequential and ordinarily results from domestic relations. The removal of the family is not conclusive of a change of domicile, when it is evident by unequivocal acts that the intention is not to make the change. The domicile of the wife and children follow that of the husband. *Matter of Bye*, 2 Daly, 525, 529. I fail to find, nor has my attention been directed to any reported case in the higher courts of this state which has applied this principle to overcome the exercise of volition and intent.

The state tax commission makes no attempt to controvert the facts established by the executor, and indeed, offered no evidence in contradiction. It relies upon its contention as to the law, that an enforced change of domicile by the very act of long continued residence in conjugal relationship may be created for a person. To paraphrase Justice McLaughlin's statement in *United States Trust Company* v. *Hart*, *supra*, and apply it to the instant case: "Unless one's domicile can be changed for him without his intention, or in spite of his intention, he must be considered at the time of his death as domiciled in Connecticut." Counsel attempts to change the decedent's domicile in spite

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of his expressed intention. Upon the oral argument, I understood the contention to be, that the residence in New York for many years supplanted the intent and compelled the conclusion in law that he was domiciled in this state; that a residence could not legally continue to exist by intention alone, when a person deliberately lived elsewhere. I agree with the learned surrogate of New York county (*Matter of Frick, supra*) that such a contention is untenable.

"Intent" is still one of the cardinal principles and one of the tests to be applied in ascertaining the domicile of a person. Webster's Dictionary says "intent" means "a determination to do a certain thing." Therefore the combination of residence and intent calls for something to be done by a combined act — the physical presence of the person, coupled with the intent, a product of the mind. *Yale* v. *West Middle School District*, 59 Conn. 489. Justice Thomas, in *Grim* v. *Lehigh Valley Coal Co.*, 171 App. Div. 493, speaking of intent, says: "The ascertainment of intention is usually a delicate process." If the theory of the law contended for by the learned counsel for the commission is correct, then the union of residence and intent is destroyed, because the law will then take away the intent which is created by the mind, and a physical residence will supply that element which the law, as I understand it, has stated, is necessary to create a change in domicile. *Animus*, it is claimed, may be presumed as matter of law from residence.

The cases in this state do not support the argument that continued residence will after a period cause the word "intent" to be stricken out of the legal definition of how a domicile may be changed, as such definition has been declared in *Dupuy* v. *Wurtz, supra*. *Matter of Newcomb, supra*, 251, says: "This discussion shows what an important and essential bearing

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intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice." The legal argument or statement of views of Surrogate Fowler in *Matter of Grant*, 83 Misc. Rep. 257, 263; affd., 166 App. Div. 921, and in *Matter of Green*, 99 Misc. Rep. 582–607, is submitted by the tax commission in support of this doctrine. It is supported by Westlake, the publicist. The principle, however, has not been followed in this state and even the learned surrogate in the *Green* case (at p. 606) says: "It is, however, urged by the state that Mrs. Green's long continued absence from her Vermont home, and her protracted sojourns in New York are conclusive of a change of domicil without proof of her *animus*. But in *Dupuy* v. *Wurtz*, 53 N. Y. 556, 561, this proposition was, I think, denied, both in substance and in principle."

In *Matter of Rutherford*, 88 Misc. Rep. 414, affd., 171 App. Div. 900, Surrogate Fowler held that intention and residence were *concurrent*. See, also, *Matter of Wise*, 84 Misc. Rep. 663. In *Matter of Long*, 167 N. Y. Supp. 1023, Surrogate Fowler, in speaking of the evidence, said: "He (the decedent) had not objected to personal tax assessments in this city and he had not exercised the right of franchise in Pennsylvania. These are controlling factors upon the question of *intent*." In the instant case John Lyon protested his assessments in Port Chester and voted in Greenwich, Conn.

In *Matter of Curtis*, 178 N. Y. Supp. 286, the learned surrogate again says: "On the other hand, a domicile once acquired is not always affected by nonresidence if the *intent* is to retain the old domicile. A

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person intending to retain his old domicile may reside almost indefinitely out of the locus of such domicile. But whether he can retain a residence when he lives elsewhere is another question. * * * A *sworn* statement is superior to the idle gossip."

As these two decisions are in point of time subsequent to the *Green* case, it cannot be well said by counsel to the commission, that even Surrogate Fowler, in 1919, was inclined to follow the principle that supplants *animo et facto* by *animus* merely.

The fact of a "long residence abroad" was urged and considered in *Dupuy* v. *Wurtz, supra.* The doctrine was also urged upon Surrogate Bradford (1849) in *Isham* v. *Gibbons,* 1 Bradf. 69, 89. The learned counsel cites *Chaine* v. *Wilson,* 1 Bosw. 673, in support of the proposition. That being a case dealing with residence in reference to the law of attachment, it has no significance. *De Meli* v. *De Meli, supra; Irwin* v. *Raymond,* 58 Misc. Rep. 319. Chief Justice Holmes in *Dickinson* v. *Brookline,* 181 Mass. 195, adopted the legal principle, that "a long continued and non-intermittent residence in one place may conclusively negative in law a pronounced, or declared intention to retain a domicile in another place to which the declarant, or '*de cujus*' never resorts." This, however, at most is an established exception to a general rule which has not fastened itself upon the law of this state. *Matter of Frick,* 116 Misc. Rep. 488. In the *Dickinson* case, the question of domicile was decided as one of fact by the jury's finding upon evidence submitted. Even in that case the court said: "Of course, if hereafter, upon the recurrence of this question, Mr. Dickinson is prepared to state that he never has given up his expectation of actually living in Cohasset, while that testimony would not take away the town's right to go to

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the jury, it may lead to a different result." But in *Babcock* v. *Slater*, 212 Mass. 434, the court says: "To establish a change of domicile, fact and intent must concur." In *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 56, Justice Holmes writing, says: "For instance, apart from possible exceptions, a man cannot retain a domicil in one place when he has moved to another and intends to reside there for the rest of his life, by any wish, declaration or intent inconsistent with the dominant facts of where he actually lives and what he actually means to do. *Dickinson* v. *Brookline*, 181 Mass. 195."

If this principle is to be adopted by our courts, it could be applied in the instant case. The fact of the decedent residing with his family in New York state for twenty years is not denied. But, our courts have not yet applied this rule of law so strongly contended for by the learned counsel for the state tax commission. In *Plant* v. *Harrison, supra,* Justice Leventritt, in a very elaborate opinion, upon the question of domicile, referring to the contention that mere physical presence in the domicile elected as abandoned, will cause a revivor of the domicile of origin, says: "Such a thesis, I take it, would be quite revolutionary of the entire law of the change of domicile and supplant the inseparable *animo et facto* by *animo* merely. The mere statement contains its own refutation." The learned counsel of the state tax commission in *Matter of Gad, supra,* contended for the reverse of his argument in the instant case, and succeeded in having the court agree with him that a nonresidence of twenty-two years was of no avail, and was not in itself sufficient to create a change in domicile, overcome as it was by evidence of far less probative force than exists in the present case. He there upheld the principles so clearly stated in *Dupuy* v.

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Misc.] Surrogate's Court, Westchester County, December, 1921.

Wurtz, and restated in *United States Trust Co.* v. *Hart.* Surrogate Cohalan declined to change the decedent's domicile in spite of her long residence abroad.

Consequently, this court is called upon to follow the well-settled law, at least in this state, relating to domicile as laid down in the cases of *Dupuy* v. *Wurtz, supra; Matter of Newcomb, supra;* and *United States Trust Co.* v. *Hart, supra.* In the cases where our courts have held the former domicile abandoned, it was always upon the ground of a clearly proved voluntary and intentional acquisition of a new domicile. The union of *factum* (residence) and *animus* (intent) so necessary under the application of the principle of these three leading cases, does not occur in the instant case. The burden of proof cast upon the executors to show a lack of such union has been sustained. Even irrespective, however, of where the burden of proof may rest, the undisputed evidence in the record makes it apparent that John Lyon never abandoned his Connecticut domicile. The facts in *Matter of Barbour, supra,* are not altogether unlike the facts in the instant case. There, similar evidence was held to point irresistibly to the fact that the decedent intended to presume his domicile in the state of New Jersey.

The character of the residence being maintained for so many years, with property of a large amount in both states, it is not claimed that any question of evasion of the payment of a tax in New York state is involved. From the whole narrative, it is the court's opinion that there is no abandonment, *sine animo revertendi,* in law or fact, of his Connecticut domicile. To restate: unless one's domicile can be changed for him, without his intention, he must be considered at the time of his death as domiciled in the state of

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Connecticut. Therefore, the domicile of origin continues and must govern the administration of his estate. The written documents are amply supported by his acts and conduct. All were *bona fide* and unequivocal and not made for the purpose of making evidence in this case. The question of motive is not raised, nor is it involved. The proceedings are remitted to the transfer tax appraiser in Westchester county to appraise the property of the decedent as a non-resident under the provisions of chapter 626 of the Laws of 1919.

Ordered accordingly.

CONVENT HOLDING CORPORATION, Landlord, *v.* CHESTER WHITE, Tenant.

(Municipal Court of the City of New York, Borough of Manhattan, Seventh District, December, 1921.)

Landlord and tenant — housing laws — reasonable rental of apartments — tenant holding over — defense of "unreasonable and unjust rent under oppressive agreements" — Laws of 1920, chap. 944 — Laws of 1921, chap. 434.

Where a lease for not less than a year at a fixed rent expired on September 30, 1921, the tenant, though holding over without a renewal of his lease, is a tenant under chapter 944 of the Laws of 1920, and in a proceeding to dispossess him for non-payment of the rent for October, 1921, he is entitled to interpose the defense of "unreasonable and unjust rent under oppressive agreements."

The statute (Laws of 1921, chap. 434) amending the housing laws has no application to such a tenant.

MOTIONS by landlords in various non-payment proceedings to strike out defenses.

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J. Sidney Bernstein, Abraham Leichter and Samuel Hellinger, for various landlords.

Olcott, Bonynge, McManus & Ernst, Nordlinger & Riegelman, Clifford S. Bostwick, Lawrence E. Sherwood, Burger & Burger, Herman Bowsky and Seelav, Cohen & Brandt, for various tenants.

DAVIES, J. These non-payment proceedings were brought to dispossess apartment tenants who had paid fixed rents under leases expiring September 30, 1921, of not less than one year's duration, and who now for the month of October, 1921, there being no contractual renewal, seek to interpose the defense of "unreasonable and unjust rent under oppressive agreements."

The landlords, relying upon chapter 434 of the Laws of 1921, move to strike out these defenses, and this court is called upon to decide whether said chapter has any application herein.

The appellate decisions construing the housing laws of April, 1920, and September, 1920, had determined that any tenant under an agreement made after April 1, 1920, had a right at any time during the life of the laws, to interpose the statutory defense, and the court's duty was to fix the fair and reasonable rental. If the rent claimed was no greater than that paid within the preceding twelve months then the burden of proving the said defense was placed upon the tenant, otherwise upon the landlord.

The 1921 legislature amended the housing laws in one respect by declaring that a judicial determination as to the fair and reasonable rental became binding as to successive rental periods until a change occurred in the situation of the premises; and in another respect by the enactment of chapter 434 with reference to said defense, the relevant part of which reads:

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"But such defense shall not be allowed if it appear that the defendant pursuant to the terms of such agreement has paid after the commencement of the term and after this section as amended takes effect three successive monthly installments of rent, which accrued after such agreement."

As the counsel for the landlord here contends, the legislature intended to place some limitation upon the rent payment period during which the tenant must exercise his right to obtain a review of the reasonableness of the agreement.

By its repeated use of the word "agreement" it clearly appears, however, that this limitation was intended to apply only during the life of the agreement in question. The landlord's contention is that occupancy after the termination date of the lease herein, to wit, September 30, 1921, is that of a common-law holdover under implied agreement, and therefore bound by this chapter 434.

Our Appellate Term (First Department) has, however, in *Hall Realty Co.* v. *Moos,* 115 Misc. Rep. 506 (Opinion by Guy, J.) stated that "Before the enactment of recent legislation the landlord would have had the option of treating the tenants either as trespassers or as tenants under a new hiring upon the same terms as the previous leases. By chapter 944, Laws of 1920, this right of the landlord has been suspended and a new form of tenancy created under which a tenant is permitted to remain in possession without permission of the landlord, and the landlord may bring an action to recover a fair and reasonable rent for the premises while in possession of the tenant. See *Rogan* v. *Weiss,* 115 Misc. Rep. 193. This action was therefore brought in proper form, and the contention of the defendants appellants that they must be treated either as trespassers, in which

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event the complaint should have been dismissed, or as tenants for a new hiring under the terms of their old leases, is erroneous."

From this it will be seen that this tenant is not now holding by agreement but as a tenant under an emergency statute and chapter 434 of the Laws of 1921 has no application to him.

The landlord's motion to strike out the statutory defenses is therefore denied and the proceedings will be continued in accordance with the provisions of the housing laws.

Motion denied.

MARY ISABELLE NEILSON, Plaintiff, *v.* ELLA REALTY CO., INC., et al., Defendants.

(Supreme Court, Bronx Special Term, December, 1921.)

Mortgages — insurance — covenant by mortgagor to keep premises insured for benefit of mortgagee is personal and does not run with the land — purchaser of real property not assuming payment of outstanding mortgage not bound by covenant in mortgage to insure — statutory short form of mortgages held not to unsettle the accepted rule of covenants — Real Prop. Law, § 254(4).

A covenant by a mortgagor to keep the premises insured for the benefit of the mortgagee is entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage.

A real estate mortgage for $28,000 contained a clause to the effect that the mortgagor would keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee and that the receipt of any such insurance money might be retained and applied by the mortgagee toward the payment of the mortgage debt or might be paid over either wholly or in part to the mortgagor, her executors, administrators, successors or assigns, to enable her to repair the buildings or erect new ones in their place, or for any other purpose or object satisfactory to the mortgagee, without affecting the lien of the

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mortgage for the full amount secured thereby before such damage by fire or such payment over took place. After the assignment of the mortgage to plaintiff she conveyed the premises subject to mortgages aggregating $38,125, with accrued interest, and subject also to certain taxes and water rents. The grantee conveyed the premises "subject to existing encumbrances" to the defendant company, which was the owner of the premises until the sale thereof under a judgment entered in an action to foreclose the $28,000 mortgage, which sale resulted in the entry of a deficiency judgment of $6,000 in favor of the plaintiff, who was the purchaser at the sale, against the mortgagor who has since relieved herself of liability therefor through the intervention of bankruptcy proceedings. At all times during defendant's ownership of the premises it paid the premiums on three certain policies of fire insurance, each for three years, and permitting other insurance without notice until required, obtained for and delivered to it by W. who at all such times was its agent. Two of said policies, each for $10,000, loss if any payable to the mortgagee as interest may appear, and containing pro-rating clauses with other insurance on the premises, were delivered by defendant to the attorneys for plaintiff herein, at or about their date of issue. The third policy for $7,500 for three years contained no mortgage clause, the loss if any was not in terms made payable to the mortgagee, and the defendant company retained it. When all this insurance was effected and at all times down to and at the time when the buildings were destroyed by fire, the cash value thereof was $27,500. The total amount received by plaintiff upon the two policies delivered to her through her attorneys was $13,190.90, which payment and an assignment of a share in the bond and mortgage were made without the knowledge or consent of the defendant company or of W. In an action to impress a lien in favor of plaintiff upon the sum of $4,363.63 claimed to have been collected by W. on the $7,500 policy and turned over by him to the defendant company, *held*, that the defendant company not having assumed the payment of the mortgage and not having covenanted with either the mortgagee or plaintiff to keep the premises insured for their benefit, the rule that where a mortgagor has covenanted to take out insurance for the benefit of the mortgagee and then takes out insurance in his own name, the same will be impressed with an equitable lien in favor of the mortgagee in case of loss, did not apply.

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Although the defendant company was not bound to insure, upon its failure so to do plaintiff might procure such insurance from year to year, adding premiums to the mortgage debt.

The stipulation as to the facts containing no admission on the part of either of the defendants, the executors of W. having been substituted as defendants in his place and stead, of any obligation by the defendant company to insure for the benefit of the mortgagee, the inference was not justified that the defendant company assumed the obligation to carry out the terms of the mortgage.

In effecting the insurance, paying the premiums and delivering the two policies to plaintiff's attorneys, the defendant company complied with the insurance clause of the mortgage, but such compliance did not, in the circumstances, create a personal obligation to insure.

Sheehan v. *Spring Valley, etc., Corp.*, 194 App. Div. 119, followed.

The statutory short form of mortgages (Real Prop. Law, § 254(3), as amended by chap. 682 of the Laws of 1917) now section 254(4) of the Real Property Law, the clear purport of which is to protect a mortgagee in every way possible, was not intended to overturn and unsettle a rule of covenants accepted in New York since 1882 and reaffirmed in *Reid* v. *McCrum*, 91 N. Y. 412, and upon the authority of that decision it was not the duty of the defendant company, under the mortgage, to take out insurance for the benefit of plaintiff, and the policy for $7,500 issued in favor of defendant did not inure to the benefit of plaintiff as the holder of the mortgage in question.

Judgment directed in favor of all the defendants, upon the merits.

ACTION to impress a lien in favor of the plaintiff as the holder of a mortgage upon certain proceeds of insurance on a building destroyed by fire.

Scott, Gerard & Bowers (Spotswood D. Bowers, George A. Lewis and Stewart W. Bowers, of counsel), for plaintiff.

Reuben Brown, for defendant Ella Realty Co., Inc.

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Leonard J. Obermeier, for defendants Frances Helen Wolff and Joseph J. Baker, as executors of the last will and testament of Abraham Wolff, deceased.

GIEGERICH, J. The plaintiff by this action seeks to impress a lien upon the sum of $4,363.63 claimed to have been collected by one Abraham Wolff and turned over by him to the defendant Ella Realty Co., Inc., as hereafter stated, on a policy of insurance issued by the Fidelity-Phenix Fire Insurance Company of New York for $7,500 upon the premises hereafter mentioned, which were destroyed by fire. Plaintiff is the assignee of the mortgage on the premises. The case was submitted upon the written stipulation of the attorneys for the respective parties from which the following appear to be the material and undisputed facts. On August 29, 1906, one Edith I. Pariser was the owner in fee simple of the premises known as No. 1814 Second avenue, borough of Manhattan, New York city, and on that day she executed a bond for $28,000 in favor of the American Mortgage Company and also a mortgage upon the said premises to secure the said bond. The said mortgage contained the following clause, among others: "And the said party of the first part covenants with the party of the second part as follows: *Second.* That the party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the party of the second part. And should the party of the second part, by reason of such insurance against loss by fire as aforesaid, receive any sum or sums of money, such amount may be retained and applied by said party of the second part toward the payment of the sum hereby secured, or the same may be paid over, either wholly or in part, to the said party of the first part her executors, administrators, successors or assigns, to enable said party

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of the first part to repair said buildings or to erect new buildings in their place, or for any other purpose or object satisfactory to the said party of the second part, without affecting the lien of this mortgage for the full amount secured thereby before such damage by fire or such payment over took place." The said mortgage and the bond thereby secured were duly assigned to the plaintiff by the American Mortgage Company, by assignment dated June 26, 1911, and recorded August 2, 1911. The said Edith I. Pariser conveyed the premises to one George Kocher, subject to mortgages aggregating the sum of $38,125 and accrued interest and subject also to the taxes and water rents for the year 1909, by deed dated March 24, 1910, and recorded March 24, 1910. The said George Kocher conveyed the said premises, "subject to existing incumbrances," to the defendant Ella Realty Company, Inc., by deed dated December 27, 1915, and recorded December 29, 1915. The defendant company owned the said premises from the time of the delivery of such deed and until the sale thereof pursuant to a judgment of foreclosure and sale bearing date the 28th day of May, 1920, entered in an action for the foreclosure of the said mortgage of $28,000, in which action the plaintiff in this action was plaintiff and the said defendant company and others were defendants. The premises were sold to the plaintiff pursuant to the said judgment and conveyed by the referee to her on February 9, 1921. The said sale resulted in a deficiency, and more than $6,000 of the debt secured by the mortgage remains due to the plaintiff and wholly unpaid. A deficiency judgment therefor was duly docketed in favor of the plaintiff against the said Edith I. Pariser, who is the only person liable for such deficiency. She has gone through bankruptcy in the United States District Court for the Eastern District

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of New York and has thus relieved herself of liability for said deficiency and the judgment docketed therefor. The said Abraham Wolff was at all times during its ownership of the said premises the agent of the defendant company and obtained for it and delivered, as hereinafter stated, each of the three policies of fire insurance hereafter mentioned, the premiums on which were paid by the defendant company. One of these policies was issued by the North British and Mercantile Insurance Company in the sum of $10,000, insuring the defendant company as owner for three years, from June 13, 1916, to June 13, 1919, against loss or damage by fire to the premises in question, with the New York standard mortgage clause attached, making the loss payable to the American Mortgage Company, as mortgagee, as interest may appear. A copy of the said policy is annexed to the said stipulation as to the facts. The said policy was delivered by the defendant company to the attorneys for the plaintiff at or about the time of its issuance, to wit, June 13, 1916. The second of such policies was issued by the Phœnix Assurance Company, Limited, of London, in the sum of $10,000, insuring the defendant company, as owner, for three years from June 13, 1916, to June 13, 1919, against loss or damage by fire to the said premises, with New York standard mortgage clause attached, making the loss payable to the said American Mortgage Company, as mortgagee, as interest may appear. A copy of the said policy is annexed to the said stipulation. The said policy was delivered by the defendant company to the attorneys for the plaintiff at or about the time of its issuance, to wit, June 13, 1916. The third policy was issued by the Fidelity-Phenix Fire Insurance Company of New York in the sum of $7,500, insuring the defendant company, as owner, for three years, from April 2,

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1916, to April 2, 1919, against loss or damage by fire to the said premises, without any mortgage clause and without making the loss payable to the holder of the said mortgage. A copy of the said policy is annexed to the said stipulation. The said policy was retained by the defendant company. The actual cash value of the building at the time the said insurance was effected and at all times down to and at the time of the fire, hereafter mentioned, was $27,500. All of the foregoing policies contained the following provision: "Other insurance permitted without notice until required." Both of the policies so delivered to the plaintiff's attorneys contained pro-rating clauses with other insurance on the premises. The policy issued by the said North British and Mercantile Insurance Company also contained the customary eighty per cent insurance clause. The plaintiff never knew of the issuance of the aforesaid policy of the Fidelity-Phenix Fire Insurance Company of New York, nor did her agents or attorneys know of the existence of such policy until after the fire hereafter mentioned and the adjustment of the loss by Wolff, as hereinafter mentioned, and the tender on December 14, 1918, of the checks hereafter mentioned. The said policies so issued by the North British and Mercantile Insurance Company and by the Phœnix Fire Insurance Company, Limited, of London, were delivered by Wolff on behalf of the defendant company to the attorneys for the plaintiff as collateral and further security for the payment of the money secured to be paid by the said bond and mortgage, and the plaintiff, by her attorneys, held the said two policies last mentioned continuously from the delivery thereof, as aforesaid, until after the said fire. The defendant company, by its agent, Wolff, held the said policy issued by the said Fidelity-Phenix Fire Insur-

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ance Company of New York and retained the same continuously until after the said fire. Neither the said American Mortgage Company nor the plaintiff at any time disapproved of either of the said two policies so issued by the North British and Mercantile Insurance Company or the Phœnix Assurance Company or the amounts thereof nor did either of them request additional or further insurance, nor did they know or have any reason to suppose that any further or other insurance had been taken out. Such third policy was taken out without the knowledge and without asking or obtaining the consent thereto of the plaintiff. On or about October 1, 1918, the mortgaged premises were destroyed by fire, which caused a loss of $16,000. At the time of the fire there was due on the plaintiff's mortgage the principal sum of $24,000 with interest. Wolff, acting for and on behalf of the defendant company and without asking or obtaining plaintiff's consent and without her knowledge, communicated with the said three fire insurance companies or their representatives or agents and agreed to and adjusted the amount of the damage to the said premises by such fire at the sum of $16,000. On December 14, 1918, Wolff presented to the attorneys who are the attorneys for the plaintiff in this action the draft of the said North British and Mercantile Insurance Company, drawn to the order of the said American Mortgage Company and the defendant company in the sum of $5,818.18, and the draft of the said Phœnix Assurance Company, Limited, drawn to the order of the defendant company and the said American Mortgage Company, in the sum of $5,818.18, which drafts were issued by virtue of the existence of the said two policies of $10,000 first above mentioned, and were by their terms in full payment of the respective shares of the companies issuing such policies of the loss and

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damage caused by the fire, and the plaintiff, by her attorneys, refused to accept the said drafts in full payment of such loss or damage and demanded that the whole amount of the insurance paid should be paid to her, including the $4,363.63 for which the said Fidelity-Phenix Insurance Company of New York had drawn its check to the order of the defendant company. This check was delivered to Wolff and it was indorsed by the payee, the defendant company, by George Kocher, its president, and delivered to Wolff to enable him to use the said sum for certain repairs to the said premises made necessary by the fire and to reimburse him for expenditures made by him for the same purpose, and thereafter Wolff deposited the same in his own personal bank account in the Farmers Loan and Trust Company on December 13, 1918. The amount so deposited was $4,363.63. The last mentioned check was received by the defendant company and Wolff in payment and satisfaction of the loss arising out of the fire under the policy so issued by the Fidelity-Phenix Fire Insurance Company of New York. The payment of the sum last above mentioned was made without the knowledge or consent of the plaintiff. Between the date of the fire and the deposit of the said check by Wolff, he had incurred expenses for repairs to the said premises, which expenses were incurred at the request and under the authority of the defendant company to the extent of at least $766.43. Upon the deposit of the said check in his bank account he reimbursed himself, with the authority of the defendant company but without asking or obtaining the plaintiff's consent in the said sum of $766.43. On March 17, 1919, after Wolff knew of the plaintiff's claim that the whole amount of the loss should be paid to her, he returned to the defendant company the balance of $3,597.20 without asking or obtaining her

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consent. In the year 1919 the plaintiff, through her attorneys and agents, commenced and undertook negotiations with the said North British and Mercantile Insurance Company and the said Phœnix Assurance Company to obtain the payment by the said companies under their said policies of a sum equal to the entire loss and damage to the premises by fire and amounting, as already stated, to the said sum of $16,000. As a result of such negotiations on the part of the plaintiff through her attorneys and agents the said North British and Mercantile Insurance Company agreed to and on April 26, 1919, did pay unto the plaintiff the sum of $7,372.72 under its said policy, and on that date the plaintiff assigned to the last mentioned company a share in the bond and mortgage to the extent of $1,554.54. In the instrument assigning the same the following clause is contained, viz.: "The interest of said insurance company hereunder is subject and subordinate to the payment in full to the owner and holder of the said mortgage of the balance of principal and interest due her, and the subrogation hereby given to said insurance company shall not impair the right of the owner and holder of said mortgage to recover the full balance due on her mortgage ahead of them." As the premises were subsequently sold for $6,000 less than was due to the plaintiff, the assignment of the said subordinate interest has no effect in the case at bar, and the parties in the said stipulation have waived any possible defect of parties growing out of the assignment of such interest. The said Phœnix Assurance Company, Limited, of London, paid to the plaintiff the sum of $5,818.18. That company refused to pay to the plaintiff any larger sum, and the said North British and Mercantile Insurance Company required the said assignment of the said share in the bond and mortgage, for the

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reason that the defendant company had taken out and held said policy of the Fidelity-Phenix Fire Insurance Company and had received payment thereunder of the aforesaid sum of $4,363.63. The total amount that the plaintiff, through her attorneys and agents, received under the policies of the North British and Mercantile Insurance Company and the Phœnix Assurance Company was $13,190.90. The aforesaid negotiations by the plaintiff with the said insurance companies and the payments aforesaid made by them to the plaintiff and the aforesaid assignment of a share in the bond and mortgage were without the knowledge or consent of the defendant company or Wolff. Wolff departed this life on May 21, 1921. He left a last will and testament and codicil thereto wherein and whereby he appointed Joseph J. Baker and Frances Helen Wolff to be the executors thereof, which will and codicil have been duly admitted to probate by the surrogate of the county of New York, and letters testamentary have been duly issued to them and by an order of this court, bearing date the 22d day of July, 1921, this action has been revived as against the said executors, who have been substituted as defendants herein in the place and stead of the said Wolff, without prejudice to any proceedings heretofore had herein, and have duly appeared in this action. The plaintiff claims that Wolff obtained possession of the moneys in question with full knowledge of all the facts, and that he thus became a party to the alleged constructive fraud of diverting moneys claimed equitably to belong to the plaintiff, and that consequently his estate is liable to the plaintiff jointly with the defendant company. The plaintiff invokes the rule that where a mortgagor has covenanted with the mortgagee to take out insurance for the benefit of the latter, and then takes out insurance in his own name,

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the same will be impressed with an equitable lien in case of loss in favor of the mortgagee. *Cromwell* v. *B'klyn Fire Ins. Co.*, 44 N. Y. 42; *Dunlop* v. *Avery*, 89 id. 593; *Carter* v. *Rockett*, 8 Paige, 437; *Wattengel* v. *Schultz*, 11 Misc. Rep. 165; *Hathaway* v. *Orient Ins. Co.*, 11 N. Y. Supp. 413; 58 Hun, 602; affd., 134 N. Y. 409; *Wheeler* v. *Factors & Traders Ins. Co.*, 101 U. S. 439. There is no doubt as to the correctness of such rule, but a covenant by a mortgagor to keep the premises insured for the benefit of the mortgagee is entirely personal in its character and does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage. *Dunlop* v. *Avery, supra; Reid* v. *McCrum*, 91 N. Y. 412; *Wheeler* v. *Factors & Traders Ins. Co., supra; Farmers Loan & T. Co.* v. *Penn. Plate Glass Co.*, 186 U. S. 434; *Sheehan* v. *Spring Valley Wood Products Corp.*, 194 App. Div. 119. In the instant case the defendant company did not covenant either with the mortgagee or the plaintiff, hence the rule above stated is not, as plaintiff claims, applicable to and decisive of the case at bar. The plaintiff insists, however, that she is entitled to enforce an equitable lien upon the proceeds of the policy for $7,500 taken out in the name of the defendant company, because, she claims, it is admitted that the said defendant was under obligation to carry out the terms of the mortgage in regard to the taking out of insurance for the benefit of the mortgagee. Especial reliance is placed by the plaintiff upon certain portions of the answers of the defendant company and the defendant executors, respectively, wherein and whereby, it is claimed, they each admitted that it was the duty of the defendant company under the mortgage to take out insurance for the benefit of the plaintiff. I do not so read the

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separate answers of the said defendants. Paragraph 2 of the complaint in substance alleges that in October, 1918, and for a number of years prior thereto, and ever since, the defendant company was the owner of the premises in question with the building thereon, and that it was obligated to the plaintiff under a mortgage upon the same in the sum of $28,000, originally made to the American Mortgage Company, and subsequently assigned to the plaintiff; that under the terms of the mortgage the defendant company was obligated to keep the buildings on the said premises insured against loss by fire for the benefit of the plaintiff, and that it was further provided in the said mortgage that in case the said defendant should receive any sum or sums of money by reason of any such insurance against loss by fire that the amount so received should be paid over to the plaintiff in part payment towards the sum secured by the mortgage. Each and every allegation so contained in the said 2d paragraph of the complaint is denied by the said separate answers, except that the defendants admit the ownership of the premises by the defendant company during the time so mentioned in the complaint and that the premises were subject to the lien of the said mortgage, which was assigned to the plaintiff. Paragraph 3 of the complaint in substance alleges that, in part compliance with the terms of the said mortgage with regard to insuring the property for the benefit of the plaintiff, the defendant company took out some insurance upon the premises and delivered the policies to the plaintiff, the policies containing the usual pro-rating clauses, with all other insurance upon the property in case of loss. All these allegations are denied in each of the answers of the said defendants, except that they admit that in compliance with the terms of the mortgage the defendant com-

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pany took out insurance upon the premises and delivered the policies to the plaintiff's assignor, American Mortgage Company, which company thereafter transferred and delivered such policies to the plaintiff, and that the policies contained the usual pro-rating clauses with all other insurance covering the property. The foregoing admissions as well as the following one contained in paragraph 21 of each of said answers, viz.: "This defendant has duly complied with all the terms and provisions of the said mortgage in so far as the same relates to insuring the mortgaged premises against loss or damage by fire for the benefit of the plaintiff," fall far short of the construction which the plaintiff claims should be placed upon them. As above shown, there is an express denial of the allegations of the complaint that it was the duty of the defendant company to keep the buildings upon said premises insured against loss by fire for the benefit of the plaintiff, and such denial is no way qualified or impaired by the said admissions which follow it. The stipulation as to the facts contains no admission on the part of either of the defendants of any obligation by the defendant company to insure for the benefit of the plaintiff. On the contrary, it merely states, as already shown, that Wolff was the agent of the defendant company during its ownership of the premises in suit, and that he obtained for such defendant the two policies which were delivered to the plaintiff's attorneys, and that the premiums thereon were paid by the said defendant. This does not justify the inference that the defendant company assumed the obligation to carry out the terms of the mortgage in regard to taking out insurance for the benefit of the plaintiff. As the defendant company did not assume the payment of the mortgage it was not bound to insure, but in case of failure on its part

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to insure in an amount and in a company approved by the plaintiff, she might procure such insurance and charge the defendant company with liability to have added to the mortgage debt an amount sufficient to reimburse the mortgagee for any insurance premium which she might properly incur for her own security. *Sheehan* v. *Spring Valley Wood Products Corp., supra.* In effecting the insurance and paying the premiums thereon and delivering the two policies in question to the plaintiff's attorneys the defendant company complied with the insurance clause contained in the mortgage. Had it not done so the plaintiff could have procured the insurance and added the sums paid for the premiums to the mortgage debt. In the absence of any facts fairly warranting the inference of a duty to insure, it will be presumed that the defendant company complied with the said clause only for the purpose of avoiding such liability. Compliance with such clause did not, under these circumstances, create a personal obligation to insure. The case of *Sheehan* v. *Spring Valley Wood Products Corp., supra,* cannot in my opinion be distinguished in principle from the present one. In that case the mortgage provided, as does the mortgage in this case, that the mortgagor would keep the building on the premises insured against loss by fire for the benefit of the mortgagee. Such a covenant is contained in the statutory short form of mortgages, originally enacted by subdivision 3 of section 4 of chapter 475 of the Laws of 1890, re-enacted in 1896 by the former Real Property Law (Gen. Laws, chap. 46 [Laws of 1896, chap. 547], § 219, subd. 3), and again re-enacted in 1909 by the present Real Property Law (Cons. Laws, chap. 50 [Laws of 1909, chap. 52], § 254, subd. 3). By chapter 682 of the Laws of 1917 these provisions of section 254 were amended and became subdivision 4 of said section 254.

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As was said in the *Sheehan* case (p. 121): "These provisions are to be construed with section 257 of the Real Property Law, declaring that 'All covenants contained in any grant or mortgage of real estate bind the heirs, executors, administrators, successors and assigns of the grantor or mortgagor, and inure to the benefit of the heirs, executors, administrators, successors and assigns of the grantee or mortgagee in the same manner and to the same extent, and with like effect as if such heirs, executors, administrators, successors and assigns were so named in such covenants, unless otherwise in said grant or mortgage expressly provided' (see also Laws of 1890, chap. 475, § 5; Real Property Law of 1896, § 222)." In the case just referred to, as in the present one, none of the grantees had assumed the payment of the plaintiff's mortgage, but took title subject thereto. The defendant Spring Valley Wood Products Corporation had the buildings insured in different insurance companies for $56,650. One policy for $2,500, covering said buildings and contents, provided that the loss, if any, should be payable to the insured plaintiff and another mortgagee, as their interest may appear. The total insured loss on the building was $13,971.78, and the proportionate amount on this $2,500 policy was conceded to be $558.87, of which $300.93 was applicable to the plaintiff's mortgages. Besides this $2,500 policy, all the other insurance had been taken by the said defendant for its own protection, and not for the benefit of the plaintiff or of the other mortgagee, and the terms of the policies covered such interest only. The plaintiff sought to impress a lien in her favor upon the proceeds of the insurance as equitable owner, to the extent of her mortgage debt of $7,000, with $125 interest and costs. The Special Term decreed the lien, because it considered that the mortgage clauses were considered

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to import that the mortgagors, their successors and assigns, including the said defendant, should keep the building insured for the benefit of the plaintiff, as mortgagee. Upon the appeal the judgment was reversed and the complaint dismissed, the Appellate Division holding that a mortgagee is not entitled to a lien upon the proceeds of insurance upon a building destroyed by fire where the insurance was taken out and paid for by the owner of the premises who purchased the same subject to, but who did not assume the obligation of the mortgage, which contained a clause for insurance in favor of the mortgagee. The court, referring to the above mentioned provisions of the Real Property Law, at pages 121 and 122, said: "These forms authorized in the Real Property Law abridged the covenants in deeds and mortgages. They read into such insurance covenant the terms 'successors and assigns;' also 'personal representatives,' which are to be applied both to covenantor and covenantee. This legislation was not intended to work a change in the substantive law, but to reduce and simplify verbiage. The courts, therefore, may presume that the Legislature, in its re-enactment of the consolidated statutes, did not intend to change the substance of the law. (See *Fifth Avenue Bldg. Co.* v. *Kernochan*, 221 N. Y. 370, 374.) The effect of these enactments regarding mortgages is to include as parties in these covenants not only the mortgagor but the representatives thereof, an implication which, besides the maker of the covenant, binds those who may thereafter assume its obligation. Here none of the grantees assumed the plaintiff's mortgages, but all took title subject thereto. Such grantees are not bound personally to insure. The clause, however, charges them with liability to have added to the mortgage debt an amount to reimburse the mortgagee for any insurance

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premium which she might properly incur for her security. An examination of the original record in *Dunlop* v. *Avery*, 89 N. Y. 593, tried by a referee, shows a finding by him (p. 23), 'That the said defendant, Chapman W. Avery, in said mortgage, covenanted in his own behalf and in behalf of his legal representatives, to keep the property described in said mortgage insured for $2,000 and that the losses, if any, by fire, should be paid to the said Dunlop (plaintiff), or a sufficient amount thereof to satisfy any balance unpaid on the said mortgage.' Yet that judgment held that such covenant was 'entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage' (p. 599). Obviously the same effect must follow a rule of statutory construction which makes this short form equivalent to the longer form there considered. That such affirmative covenants do not run with the land was mentioned in *Miller* v. *Clary* (210 N. Y. 127). The large and increasing volume of mortgage insurance forbids the idea that in a statute to abridge common forms it was intended to overturn and unsettle a rule of covenants accepted in New York since 1882 and reaffirmed in *Reid* v. *McCrum* (91 N. Y. 412) and now widely recognized. (Joyce, Ins. 2d ed. sec. 23, p. 8; 27 Cyc. 1259; *Columbia Ins. Co. of Alexandria* v. *Lawrence*, 10 Pet. 507, 513; *Farmers' Loan, etc., Co.* v. *Penn. Plate Glass Co.*, 186 U. S. 434)." From the authority of that case it follows that it was not the duty of the defendant company, under the mortgage, to take out insurance for the benefit of the plaintiff, and that the policy for $7,500 issued by the Fidelity-Phenix Fire Insurance Company of New York, in favor of the said defendant, did not inure to the benefit of the plaintiff as the holder of the mortgage in question. The plaintiff's

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counsel urge that even though it may not have been the duty of the defendant company, under the mortgage, to take out insurance for the benefit of the plaintiff, yet by reason of its alleged recognition of such duty by actually taking out insurance for the plaintiff's benefit and thereby obtaining for itself pecuniary benefit from a three-year rate in place of an annual rate, which would have been required had the plaintiff been compelled to take out insurance, the plaintiff was entitled to rely upon the assumption of such obligation by the said defendant, and that the defendants are estopped from denying the existence of the said alleged duty under the mortgage, when, as plaintiff claims, to do so will result in serious loss to her. *Rothschild* v. *Title G. & T. Co.*, 204 N. Y. 458; *White* v. *Kenyon*, 33 App. Div. 623; affd., 164 N. Y. 590; 2 Pom. Eq. Juris. (3d ed.) § 965, and *Hathaway* v. *Payne*, 34 N. Y. 92, 109, are cited in support of such contention, but I fail to see the application of such authorities. The mere fact that the defendant company may have had a pecuniary advantage by insuring the property for three years instead of one year did not create any personal obligation on its part to insure for the plaintiff's benefit. If the defendant company was able to obtain such a reduction in the rate it was not, as plaintiff claims, at her expense. The rights of the plaintiff could not be impaired by policies for a longer period than one year if they were sufficient in amount and form and issued by a solvent insurance company. During the existence of the mortgage debt she was entitled at all times to be fully and abundantly protected, and if the policies conformed to these requirements she was fully protected, even though the property was insured for a longer term than one year, and the defendant company thereby obtained the benefit of a lower insurance rate. While it is true that under subdivision

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four of section 254 of the Real Property Law the plaintiff, had the defendant company failed to insure the property, would have been permitted to insure it "from year to year" only (*Bieber* v. *Goldberg*, 133 App. Div. 207), such provisions, nevertheless, do not prohibit the owner of the property from tendering to the holder of the mortgage a policy for a longer term. The latter has, of course, a right to approve or disapprove of the amount of the insurance and the company in which it may be carried (Real Prop. Law, § 254, subd. 4. See *Heal* v. *Richmond County Savings Bank*, 127 App. Div. 428), and if the policy tendered is not in these respects satisfactory, or if the form thereof does not fully protect the holder of the mortgage (Real Prop. Law, § 254, subd. 4) and the property owner refuses to furnish a satisfactory policy, the holder of the mortgage may insure the property pursuant to the provisions of the said subdivision at the expense of the property owner. So far as I can gather there was nothing in the conduct of the defendant company in taking out the two policies in question and delivering them to the plaintiff's attorneys which would estop it from denying the existence of its alleged duty under the mortgage to insure the property for the protection of the plaintiff. Neither was there anything in the conduct of the defendant company in furnishing such two policies to the plaintiff's attorneys to lull them into inaction. Moreover, I am unable to discover in the record any evidence from which it may fairly be inferred that the defendant company in so furnishing the plaintiff's attorneys with the two policies did anything to mislead them or to cause the plaintiff to change her position. If, as plaintiff claims, no examination of the two policies which were delivered to her attorneys was ever made, the failure to do so is not, so far as the evidence dis-

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closes, due to any fault on the part of the defendant company or Wolff, its agent. Another point urged on behalf of the plaintiff is that, even if it is assumed that the defendant company was under no obligation to take out insurance for the benefit of the plaintiff, nevertheless, when it in fact did so, it at least acted as agent of the plaintiff in so doing, and having so acted, it will not be permitted to make a profit for itself out of the transaction at the expense of the plaintiff, and that equity will treat it as a trustee for the benefit of the plaintiff. There is no question as to the correctness of the rule relied on by the plaintiff, that an agent undertaking any business for another is disabled in equity from dealing in the matter of the agency upon his own account or for his own benefit; and if he does so in his own name he will be considered as holding in trust for his principal. 39 Cyc. 188; *Densmore* v. *Searle*, 7 App. Div. 45, 46; 2 Pom. Eq. Juris. (3d ed.) § 959. Such rule, however, is not applicable to the present case. It appears from the stipulation as to the facts that Wolff, as the agent of the defendant company, obtained for it the two policies in question, which were delivered by the said defendant company to the attorneys for the plaintiff at or about the time of their issuance and that the premiums thereon were paid by such defendant. The record, however, is silent as to the circumstances under which such insurance was obtained and the policies were delivered. There is thus no evidence in the case that the defendant company or Wolff, its agent, was requested by the plaintiff or her attorneys to procure the policies and deliver the same to her or them. For aught that appears the insurance may have been procured and the policies delivered without a previous request from or understanding with the plaintiff or her attorneys. In this connection it

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should be borne in mind that although not in duty bound to insure, the defendant company, nevertheless, had the right in order to avoid liability to have added to the mortgage debt any sum which the plaintiff might pay for premiums on insurance for her security to insure the property for her benefit and tender the policies to her or her attorneys, which she or they had a right to disapprove for any sufficient cause. The stipulated facts are therefore wholly insufficient to justify a finding that the defendant company acted as agent for the plaintiff when it took or caused to be taken out insurance for her benefit. In order to justify such a finding it must be apparent from the facts and circumstances that there was an express or implied intention to create the relation of agency. 2 C. J. 437. The plaintiff claims, furthermore, that her right to the relief sought is in no way affected by the retention of the two policies which were delivered to her attorneys because, as claimed, there was no obligation on her or their part to examine them. In support of the point so raised the argument is advanced that the only thing that the plaintiff was required or permitted to do was the affirmative act of approving the amount of the insurance and the company in which the same should be carried and that she was not required to approve the form of the policies. With this argument I cannot agree. Subdivision 4 of section 254 of the Real Property Law, among other things, provides that a covenant to insure " must be construed as meaning that the mortgagor, his heirs, successors and assigns will, during all the time until the money secured by the mortgage shall be fully paid and satisfied, keep the buildings erected on the premises insured against loss or damage by fire, to an amount and in a company to be approved by the mortgagee, and will assign and

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deliver the policy or policies of such insurance to the mortgagee, his executors, administrators, successors or assigns, so and in such manner and form that he and they shall at all time or times, until the full payment of said moneys, have and hold the said policy or policies as a collateral and further security for the payment of said money, and in default of so doing, that the mortgagee or his executors, administrators, successors or assigns, may make such insurance from year to year, in the sum not exceeding the principal sum for the purposes aforesaid, and pay the premium or premiums therefor, * * *." As I construe these provisions the words "in default of so doing," which refer to the first portion of such subdivision and to all that precede such words, mean, that the mortgagee has the same remedy in the event that the policies, so far as concerns amounts and companies, are not satisfactory to him as he has for their failure to be in proper form to protect him. I fully agree with the plaintiff's counsel, that the clear purport of the said subdivision 4 of section 254 of the Real Property Law is to protect the mortgagee in every way possible. Under its provisions the plaintiff, in case the policies were insufficient to protect her, and the defendant company refused to obtain further insurance, could have procured new or additional insurance and added the premiums paid therefor to the mortgage debt. The plaintiff, however, did not avail herself of such remedy. It may be true, as contended for by the plaintiff, that she was under no obligation to examine the two policies in question. Had she done so the mistake in the said policy issued by the Phœnix Assurance Company, Lim., of London, in naming the American Mortgage Company as the mortgagee instead of the plaintiff to whom the mortgage had theretofore been assigned, would no doubt have been

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discovered. Notwithstanding such mistake the insurance company last above named paid to the plaintiff the sum of $5,818.18 on the policy so issued by it. The plaintiff maintains that since the policy just mentioned had no valid mortgage clause it was only enforcible proportionately with other insurance on the property, including that taken out by the defendant company for $7,500 for its own protection, and that but for such insurance the sum payable to her would have been considerably greater. The plaintiff further urges that no approval of the two policies can be implied from the mere retention thereof, and by holding them without reading their contents she is not barred from objecting to the defendant company obtaining an advantage at her expense. Be this as it may, since the defendant company has not assumed payment of the mortgage it was not bound to insure, and since it had not assumed or recognized any duty under the mortgage to insure and was not the agent of the plaintiff when the policies in question were procured and delivered to her attorneys, the plaintiff would seem to be without remedy against the defendants or either of them. The plaintiff may have been under no obligation to examine the policies, yet if she did not avail herself of the remedy afforded by the statute to protect herself, she cannot complain if she suffered any loss. The briefs of counsel for the respective parties discuss the question whether or not the plaintiff collected all the moneys which were collectible under the two policies in question. As I am clearly of the opinion, from a consideration of the whole case, that plaintiff has not established any cause of action against either the defendant company or the defendant executors, it will not be necessary for me to pass upon this question. My conclusion is that there should be judgment in favor of all the

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defendants upon the merits. The question of costs will be determined when the requests for findings of the respective parties are submitted. All papers received by me, including copy of pleadings, the stipulation as to the facts, briefs and filed papers, have been returned to the clerk, to whom all further papers should be handed in, with proof of service.

Judgment for defendants.

GEORGE H. KENNEDY et al., as Executors, etc., Plaintiffs, *v.* EDWARD SMITH et al., Defendants.

(Supreme Court, Erie County, December, 1921.)

Adverse possession — tenants in common — dower — guardian in socage — action to determine claim to real property — widow's possession held not to be adverse to her husband's heirs.

The legal presumption is that the possession of one of several tenants in common is that of all.

One of several tenants in common may acquire title against the co-tenant by adverse possession, but in order to do so, the possession must be such as to constitute an exclusion or ouster of the co-tenants evidenced by an open, notorious and adverse occupation under a claim of right.

A widow entitled to dower is during the minority of her infant children entitled as their guardian in socage to the possession of premises in which the children have an undivided interest.

Where a widow originally became possessed of real estate of which her husband died seized rightfully as dowress and guardian in socage and not adverse to her deceased husband's heirs at law, such occupancy will be deemed subordinate to their lawful claims unless there was a definite, open and unquestionable change of position.

Zapf v. *Carter*, 70 App. Div. 395, distinguished.

Evidence in an action to determine a claim to real property of which the husband of plaintiff's testatrix, many years ago,

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died seized, considered, and *held*, that there being a failure to prove an occupancy of the premises by plaintiffs' testatrix who devised the same, under a claim of title adverse to that of her stepson and daughters, defendants were entitled to judgment.

SUIT in equity to determine claim to real property.

George H. Kennedy, for plaintiff.

Warren Tubbs and Carlos C. Alden, for defendant Smith.

Ernest F. Kruse, for defendants Hoover.

SEARS, J. In 1857, the premises in question at the northwest corner of South Park avenue and the Abbott road in the city of Buffalo, together with an adjoining piece of property to the west, bounded on the south by the Abbott road, were owned by one Michael Roberts. In June of that year, by deeds to and from a third person, Michael Roberts caused the title to the piece of property adjoining the premises in dispute on the west but not the title to the premises in question, to be vested in Louisa, his wife. Upon the premises involved in this action there had been erected, previous to 1857, a two-story frame building, where Michael Roberts and his family lived, and where he conducted a feed and grocery store and saloon or hotel. This building, with additions mentioned hereafter, is still standing. In 1862 Michael Roberts died, leaving his widow, Louisa, and three children, a son William Roberts who was the child of an earlier marriage, and is the father of the Roberts defendants, a daughter, Emma, who is the mother of the Hoover defendants, and a daughter, Louisa, who became the wife of the defendant Edward Smith.

At the time of the death of Michael Roberts, his

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children were aged respectively, William fourteen, Emma eight and Louisa six years. The widow and the three children continued to live in the house on the premises in question, and the widow continued the business. A few years later Louisa, the widow of Michael Roberts, became the wife of one John Stamp who thereupon joined the household of his wife, and she continued to live upon the premises in question with her husband, and to run the business conducted there. There were children born of this marriage, and they too lived in the house. William Roberts grew up and went west. Emma married Mr. Hoover in 1873, before becoming of age, and moved to another house in the same part of the city of Buffalo, and continued to live in that vicinity the rest of her life. In 1875 Louisa married the defendant Smith, before becoming of age, and moved to a house in the same general vicinity. Louisa, the youngest Roberts child, became of age in 1877.

John Stamp, while living on the premises, made improvements to the building, erecting two additions at a cost in the aggregate of about $1,000, which were partly upon the premises in question and partly upon the adjoining premises which his wife, Louisa, owned, the building projecting over the westerly line of the premises involved in this action about ten feet.

The property in question and the adjoining property have always been assessed by the assessors as one parcel and were assessed to Michael Roberts until 1867, and after that, for many years, to John Stamp. They were formerly enclosed by fences and buildings. The taxes upon the premises in question, during the lifetime of Louisa, were always paid by her or her second husband, and large sums have been expended by her for local improvements, such as paving, sewers, etc. The insurance premiums from 1904 to the date

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of her death were paid by Louisa Stamp, and the insurance policies were written in her name.

In 1893, John Stamp and his wife and their children vacated the premises, going to live in another house in the same neighborhood, and from that time, as long as Louisa Stamp lived, the premises were rented by her at first for two hundred dollars a year, a little later for twenty dollars a month, and finally for thirty-eight dollars a month, and the rents were always paid to her. In 1900, John Stamp died. In 1893, Louisa Smith died, leaving a will, by the terms of which her real property was devised to her husband, the defendant Edward Smith. In 1905, Emma Hoover died intestate, leaving the defendants Hoover as her heirs-at-law. William Roberts died in 1911, leaving the Roberts defendants as his heirs-at-law. In 1919, Louisa Stamp died, leaving a will, in which she devised her real estate to these plaintiffs as trustees, who, since Louisa Stamp's death, have collected the rents. About eighteen months after the death of Louisa Stamp, this action was brought.

About 1898, the premises in question were rented to one of Louisa Stamp's grandsons named Hoover, who paid rent to his grandmother. At one time Louisa Stamp received and refused an offer for the purchase of the premises, and stated the sum at which she was willing to sell it. At another time she talked of conveying the premises to one of her grandchildren. Throughout the life of Louisa Stamp, she was at all times on friendly terms with her children and grandchildren, and they visited her frequently, and all the descendants of Michael Roberts except William Roberts and his descendants, lived in the immediate vicinity, and William Roberts from time to time came to Buffalo and saw his stepmother.

The question presented by this action is whether

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Louisa Stamp obtained title to the premises by adverse possession and this question is by no means free from doubt. There is nothing to justify the conclusion that John Stamp was ever personally in possession. If title was gained by adverse possession, it was by Louisa Stamp. Louisa, the widow of Michael Roberts, was at all times entitled to dower in the premises, and during the minority of her children Louisa and Emma, was their guardian in socage, and entitled to possession of the premises because of their undivided two-thirds interest. While it is unquestionably true that the possession of one of several tenants in common is, presumably, the possession of all (*Allen* v. *Arkenburgh*, 2 App. Div. 452; *Berger* v. *Horsfield*, 188 id. 649), nevertheless, it is equally true that one of several tenants in common may acquire title against his co-tenants by adverse possession. In order to do so, however, the possession must be such as to constitute an exclusion or ouster of the co-tenants. *Florence* v. *Hopkins*, 46 N. Y. 182, 186. This may be evidenced by an open, notorious and *adverse occupation* under a claim of right. *Culver* v. *Rhodes*, 87 N. Y. 348. Was the occupancy by Louisa Stamp sufficient to amount to an ouster of her stepson and her own daughters? It may be conceded that it would have been sufficient as against a stranger, but the other owners were not strangers; two of the three were of her own blood, and the third was her husband's child whom she had evidently brought up, as he was only fourteen years old at the time of the death of his father, Michael Roberts, and was less than six when she married Michael Roberts. The widow, Louisa, originally became possessed of the property rightfully, as dowress and guardian in socage, and not adversely to her husband's heirs-at-law. Her occupancy must be construed as subordinate to the lawful claim of the heirs-

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at-law, unless there was a definite, open and unquestionable change of position. *Knolls* v. *Barnhart*, 71 N. Y. 474.

The authority in this state most favorable to the plaintiffs is *Zapf* v. *Carter*, 70 App. Div. 395. A similar occupancy by a dowress, with no more convincing evidence of a claim of title than occurs in this case, was there held to have ripened into a complete title valid against the heirs-at-law of her husband. Two points are to be noted, however, in respect to the case of *Zapf* v. *Carter:* (1) the persons against whom the widow was held to have acquired title by adverse possession were not her relatives, and no position of confidence on the part of the widow or of filial respect and duty on the part of the heirs-at-law existed to deter the dowress on the one hand from ousting the heirs-at-law, or the heirs-at-law on the other from demanding possession; and (2) the plaintiff in the *Zapf* case had been the executor of the widow and had learned of the outstanding title while he had been acting as such and had then purchased it for his own benefit, and Mr. Justice Spring, in the course of his opinion in that case, said: "The course of the plaintiff in procuring the conveyances from the two sisters of Ashley does not require us to scan with too much minuteness the title of the defendant and her devisor. * * * The courts have uniformly condemned the acts by which an agent obtains title to property to undermine his principal, and this conduct of the plaintiff is reprehensible in the extreme, although the referee, by evidence which may be said to sustain it, has found he apprised the vendors he was buying the land for himself."

In the instant case, the repairs and improvements were made by John Stamp and may well have been a consideration for his use of the property. The taxes

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and local assessments presumably were paid out of the rents. While some of the local assessments were many times larger than the rents for any one year, it does not appear that they were larger than the aggregate value of the use and rents received. What accountings, if any, were had between the mother and her children are unknown, but it may well be that the children received none, and, in fact, may not have known of their interest in the real estate. It is true that from the time the children of Michael Roberts became of age, they could have maintained an action of ejectment against their father's widow, thus requiring her to seek the admeasurement of her dower. *Jackson* v. *O'Donaghy,* 7 Johns. 247. But this circumstance is not conclusive of the nature of the occupancy. As long as an assignment of dower is not required, the dowress may well be considered in possession by consent. *Boyer* v. *East,* 161 N. Y. 580. I am loathe to hold, unless compelled to do so, that a mother thus acquired title against her own daughters. On the whole, I am of the opinion that there has been a failure to prove an occupancy under claim of title adverse to that of her stepson and daughters.

These considerations would be less strong in the case of Edward Smith, were he the sole record owner, but as his interest is but an undivided one, I am of the opinion that there was no change in the holding as to him any more than as to Emma Hoover and her heirs, or William Roberts and his heirs.

Judgment is, therefore, granted in favor of the defendants, with a single bill of costs to the defendants who have appeared.

Judgment for defendants.

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JOHN E. MADDEN, Plaintiff, *v.* JOHN H. ROSSETER, Defendant.

(Supreme Court, New York Special Term, December, 1921.)

Receivers — commissions and counsel fees — partnership — commissions on delivery of valuable horse by receiver to plaintiff fixed at reasonable amount to be paid by defendant.

Under a contract by which plaintiff and defendant became partners or joint adventurers in a stallion defendant was to keep the horse in California until the end of the season of 1920 and plaintiff was to keep him in Kentucky for the seasons of 1921 and 1922, after which time arrangements satisfactory to both parties were to be made. At the end of the season of 1920 defendant refused to deliver the horse as agreed. Thereafter in an action for the dissolution of the partnership, an order granting mandatory injunction directing the delivery of the stallion to plaintiff was affirmed on appeal, and the receiver appointed to carry out the order did so without litigation or ancillary receivership in California and delivered the horse to plaintiff on May 23, 1921, in good condition. *Held*, upon motion to fix the compensation of the receiver, etc., that plaintiff was entitled to be reimbursed for the taxable expenses caused by defendant's unwarranted acts, and though the dissolution action was undisposed of, the services of the receiver, admittedly worth $5,000, and those of his counsel, proven to be worth $500, should be paid by defendant, and it is so ordered.

MOTION for receiver's commissions and counsel fees.

Kalish & Kalish, for plaintiff.

Thomas F. Kane and John B. Dahlgren, for defendant.

Henry L. Franklin, for receiver, Franklin L. Brooks.

GUY, J. Motion by a receiver to fix the compensation due him; also his counsel's fees. The receiver was

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directed to and did take from the defendant in California and deliver to plaintiff in Kentucky a valuable stallion named Friar Rock. Plaintiff first owned the horse. In 1918 plaintiff sold defendant a half interest and they became partners or joint adventurers in the horse under a contract by which defendant was to keep the horse in California until the end of the season of 1920, and plaintiff was to keep him in Kentucky for the seasons of 1921 and 1922; thereafter new arrangements mutually satisfactory were to be made. The fees wherever received were to be divided equally. When the end of the season of 1920 came defendant refused to deliver the horse to plaintiff. Plaintiff sued for a mandatory injunction for the delivery of the stallion to him; for a receivership to effect the delivery; also for a dissolution of the joint adventure or partnership. In February, 1921, an order was made granting a mandatory injunction directing the delivery of the horse to the plaintiff and appointing the receiver to carry out such delivery. The defendant appealed from the order, and, on appeal, the order was affirmed. Thereafter the receiver carried out the order with tact and diplomacy, avoiding any litigation or ancillary receivership in California. He delivered the horse to plaintiff on May 23, 1921, in good condition. It is admitted that the receiver's services, if they can now be directed to be paid for prior to the dissolution of the partnership or joint adventure, were worth $5,000, and those of his counsel are proved to be worth $500. While the dissolution action does not appear to have been disposed of, as to the primary relief sought the plaintiff is the winner, and has prevailed by reason of the affirmance on appeal and execution of the mandatory injunction for the delivery of the horse to him under the contract which entitles him to keep it during the

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1921 and 1922 seasons. The receiver's commissions on the delivery of a valuable live animal are not limited or to be computed upon the cash collected by him; $5,000 upon a $200,000 or $250,000 live animal is just, proper and reasonable. *Matter of Smith Co.*, 31 App. Div. 39, 40–43; *Moe* v. *McNally Co.*, 138 id. 480, 487. How are such commissions to be paid or allowed? In several states the rule is that the costs of a receivership incurred by the assertion of a wrongful claim which is determined or found to be wrongful may be taxed against whichever party asserted such wrongful claim instead of being taken from the receivership funds. *Radford* v. *Folsom*, 55 Iowa, 276, 287; *Highley* v. *Deane*, 168 Ill. 266, 271, 272; *Link Belt Machinery Co.* v. *Hughes*, 195 Ill. 413, 418; *City of St. Louis* v. *St. Louis Gas Light Co.*, 87 Mo. 223; *Cutter* v. *Pollock*, 7 N. Dak. 631, 632–635, cited with approval in *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 374; *Espuela Land & Cattle Co., Limited*, v. *Bindle*, 11 Tex. Civ. App. 262–264. By the affirmance of the mandatory injunction and its execution the plaintiff has been adjudged the winner and has prevailed, with the right to keep the horse during the seasons of 1921 and 1922. He is, therefore, entitled to be reimbursed for the taxable expenses caused by defendant's unwarranted acts. The cases holding that where a receiver was illegally appointed and his appointment was vacated the party procuring his appointment must pay him (*Weston* v. *Watts*, 45 Hun, 219, 220–222; *Pittsfield Nat. Bank* v. *Bayne*, 140 N. Y. 321, 329–331) have no application to the case at bar, where the appointment of receiver was the object of the action, and as such has been sustained on appeal. Receiver's fees fixed at $5,000; those of his counsel at $500; to be paid by defendant.

Ordered accordingly.

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WARNER, BARNES & COMPANY, LTD., Plaintiff, v. WARNER SUGAR REFINING COMPANY and ORIENTE SECURITIES COMPANY, Defendants.

(Supreme Court, New York Special Term, December, 1921.)

Sales — contracts "c. i. f."— construction of — reformation of contract for sale of sugar shipped by steamer — demurrer — equity — "landed weights" diminished by loss or damage due to risk of voyage.

In an action for the reformation of a contract in writing which provided for the sale of "about 2,000 tons Philippine Is. Dry Sugar, May, June, July shipment by str. or steamers for New York, * * * landed weights, tare 2 per cent., cost insurance and freight. Payment by buyers opening confirmed New York credit for approximate amount of invoice at 90 days sight, against which sellers to draw for not exceeding 90 per cent. of invoice amount; full shipping documents, including policy of insurance for invoice value plus 10 per cent. attached to draft. Payment for balance of invoice to be made in New York after completion of delivery and settlement of outturn weights and tests. * * * Delivery to be tendered ex vessel at a customary safe wharf or refinery in port of New York as directed by buyer. Damaged, if any, to be taken at a fair allowance. * * * In event of total loss buyers to collect insurance and effect settlement with sellers for the full amount of invoice," the complaint alleged that the writing did not represent the real contract, but that the words "damaged, if any, to be taken at a fair allowance" were inserted through inadvertence and mutual mistake. It was further alleged that plaintiff presented full shipping documents covering the 2,000 tons of sugar and a policy of insurance with draft attached and had received payment in a certain sum. The full value of the sugar shipped, at the agreed price, including, however, the sugar lost in transit by the stranding of the vessel amounted to a larger sum than that received by plaintiff who asked judgment for the difference. *Held,* upon overruling a demurrer with leave to serve an answer, that if the contract was reformed as prayed for it would be susceptible of the reasonable construction that though the seller was required to deliver goods at a

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customary wharf in New York and the price could not be finally determined until the goods were landed, yet that the property in the goods and the risk of loss was intended to pass when the full shipping documents were presented, including an insurance policy.

In case the goods were totally lost then by the express terms of the contract the buyers were to pay the full amount of invoice, and if the goods were partially lost, as here, then it was fairly inferable that while payment was to be made according to "landed weights," the seller should not be deprived of the right to show that these "landed weights" were diminished by loss or damage due to the risk of the voyage.

ARGUMENT of demurrer to complaint in suit for reformation of contract.

Lord, Day & Lord (Allen Evarts Foster and Franklin Grady, of counsel), for plaintiff.

Henry A. Rubino, for defendants.

LEHMAN, J. It is alleged in the complaint herein that the plaintiff shipped 2,000 tons of sugar from the Philippine Islands to New York city in accordance with a contract between itself and these defendants, but the steamship on which the sugar was shipped stranded on one of the Hawaiian Islands and 840,191 pounds of said shipment of sugar was lost. The contract between the parties was in writing, and provides for the sale of "about 2,000 tons Philippine Is. Dry Sugar, May, June, July shipment by str. or steamers for New York, * * * landed weights, tare 2 per cent., cost insurance and freight. Payment by buyers opening confirmed New York credit for approximate amount of invoice at 90 days sight, against which sellers to draw for not exceeding 90 per cent. of invoice amount; full shipping documents, including policy of insurance for invoice value plus 10 per cent. attached to draft. Payment for balance of invoice to

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be made in New York after completion of delivery and settlement of outturn weights and tests. * * * Delivery to be tendered ex vessel at a customary safe wharf or refinery in port of New York as directed by buyer. Damaged, if any, to be taken at a fair allowance. * * * In event of total loss buyers to collect insurance and effect settlement with sellers for the full amount of invoice." It is further alleged in the complaint that the plaintiff presented full shipping documents covering said 2,000 tons of sugar shipped from the Philippine Islands, and a policy of insurance with draft attached, and has received payment in the sum of $628,740. The full value of the sugar shipped, at the agreed price, including, however, the sugar lost in transit by the stranding of the vessel, amounts to $648,187.38, and the plaintiff has brought this action for the difference.

The plaintiff claims that it was the intention of the parties that the risk of loss or damage during the voyage should rest upon the defendants, but under the written instrument as signed by the parties, it is evident that the risk of damage prior to the delivery of the sugar in New York would fall upon the plaintiff, for it is expressly provided in the contract that delivery is to be made "ex vessel" and that payment is to be made on "*landed weights*" and "*damaged if any to be taken at a fair valuation.*" The complaint, however, alleges that the written instrument does not represent the real contract between the parties but that the words "damaged, if any, to be taken at a fair allowance" were inserted in the written instrument through inadvertence and by mutual mistake, and the plaintiff therefore asks for a reformation of the contract in this respect.

The defendants have demurred to the sufficiency of the complaint, urging that even if these words were

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inserted by mutual mistake and should be eliminated, yet under the written agreement even in its amended form the risk of loss would still fall on the plaintiff, and the meaning of the contract at least in this respect would not be altered.

It seems to me that the demurrer must be sustained if the written contract when reformed would still as a matter of law unambiguously cast the risk of loss upon the plaintiff, but must be overruled if the written contract when amended would be ambiguous on this point, and the plaintiff has properly alleged that under the contract as amended the risk of loss was intended to fall upon the defendants.

The contract as pointed out above calls for payment of a price which includes cost insurance and freight, and such contracts, popularly described as "c. i. f." contracts, ordinarily require the seller merely to make shipment, and the property in the goods and risk of loss passes upon such shipment to the buyer, for the seller has done everything he is called upon to do under his contract. In the recent case of *Willits & Patterson* v. *Abekobei & Co., Ltd.*, 197 App. Div. 528, the Appellate Division of this department has, however, pointed out that though usually under such contracts the risk of transportation rests upon the buyer, "if, however, there be anything in the contract which shows that such was not the intention of the parties, the contract will be construed according to their intention." In that case the contract provided for "net landed weight" "Price $15.00 per 100 lbs. c. i. f. San Francisco," and the court held that these terms showed an intent that "the weight at the point of landing, to wit, San Francisco, must accord with the requirements of the contract," and that the ordinary meaning of the expression c. i. f. must be deemed modified so as to make the contract

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one for delivery at San Francisco. It is upon this case that the defendants rely as authority to sustain their contention.

It must be conceded at the outset that the contract under consideration in this case contains in perhaps even stronger terms the same indicia of intention to place the risk upon the seller which were contained in the contract under consideration by the court in the case relied upon by the defendants. It expressly provides in unambiguous language for the payment of the price according to " landed weights " and it further expressly provides for delivery of the goods in New York ex vessel at wharf. There are, however, additional terms which differentiate the two contracts. In the present case the seller had the right upon presentation of full shipping documents including full insurance to draw upon the defendants for ninety per cent of the invoice price. The delivery of these documents to the defendants seems to me strong evidence of an intent to give the defendants dominion over the sugar covered by the documents, and to place the risk of loss upon the defendants. In the very case relied upon by the defendants, the court pointed out that the seller retained the policy of insurance, whereas in the present case, the insurance was delivered to the buyer and protected the defendants against loss. In Williston on Sales, section 301, the rule is stated that " if it is agreed that one party or the other shall insure the goods, it seems a necessary inference that the parties intended the risk to be borne by this party," and it seems to me quite clear that the same inference that the party who under the contract receives the benefit of the insurance bears the risk of loss may be drawn where one party under the contract is required to take out insurance for the benefit of the other party.

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It seems to me that in the present case if the contract is reformed as prayed for in the complaint, the reformed contract is susceptible of the reasonable construction that though the seller was required to deliver the goods at a customary wharf in New York, and the price could not be finally determined until the goods were landed, yet that the property in the goods and the risk of loss was intended to pass when the full shipping documents were presented, including an insurance policy. If the goods were totally lost, then by the express terms of the contract the buyers were to pay the full amount of invoice, and if the goods were partially lost, then it is fairly inferable that while payment was to be made according to landed weights, the seller should not be deprived of the right to show that these landed weights were diminished by loss or damage due to the risk of the voyage. Any other construction of the contract would require the seller to provide insurance for the buyer for a loss which falls not on the buyer but on the seller.

Demurrer is, therefore, overruled, with costs and with leave to the defendant to withdraw the demurrer and serve an answer within twenty days after entry of order herein upon payment of said costs.

Demurrer overruled.

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LOUISE AUDITORE, Plaintiff, *v.* EVA CANTANZARO, Defendant.

(Supreme Court, Kings Special Term, December, 1921.)

Provisional remedies — arrest — motion to vacate order — additional affidavits permitted — Civil Practice Act, §§ 822, 1569, 1573.

Under the Civil Practice Act additional affidavits in support of an order of arrest may be received upon a motion to vacate the order.

Whatever the application of section 1573 of the Civil Practice Act, so far as a motion made before that statute took effect, to vacate an order of arrest theretofore granted, is concerned, a reading of section 1569 of the same act is necessary and under section 822 thereof, which must also be read but is not limited to supplying defects, the plaintiff may be permitted to submit additional affidavits in support of the order of arrest.

MOTION to vacate an order of arrest.

Cahill & Schneider, for plaintiff.

Jenks & Rogers, for defendant.

KAPPER, J. Motion on notice to vacate an order of arrest. The order was obtained before the Civil Practice Act took effect. The motion to vacate also preceded the taking effect of that act. Upon the argument plaintiff presented additional affidavits and asked their consideration in support of the order, to which objection was interposed by the defendant under the claim that the noticing of the motion constituted a "right accrued or acquired" within the provisions of section 1573 of the Civil Practice Act, which "right" the said section declares shall not be affected or impaired by the act. Analogous pro-

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visions were contained in section 3352 of the Code of Civil Procedure ever since the enactment of that Code, but I do not find that a right "accrued or acquired" prior to the enactment of that section was ever construed to relate to a remedial procedure such as I think is involved in the practice now proposed by the plaintiff. Under that section of the Code of Civil Procedure (3352) it had been decided that such matters as costs accrued, the application of the statutes of limitations, and the right of appeal were all within the purview of rights "accrued or acquired" under section 3352, *supra*. See cases in note to Clevenger's Supreme Court Practice, § 1573. Whatever the application of section 1573 of the Civil Practice Act may be, in so far as the present case is concerned a reading of section 1569 of the same act is necessary. It is there provided that, "Proceedings pursuant to law in an action or special proceeding taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act or by the repeal thereby of any provision of the code of civil procedure, unless otherwise expressed, and subsequent proceedings in such action or special proceeding must be conducted in accordance with the laws in force on the day before this act takes effect, except as otherwise provided in this article, and *except that the court or judge may apply thereto, in the interest of justice, any remedial provision of this act not inconsistent with the proceedings theretofore had or taken in such action or special proceeding.*" And likewise there must now be read section 822 of the act, which provides that upon an application to vacate an order of arrest upon notice, "the provisions of this act shall not prevent the court or judge, in furtherance of justice, from allowing new proof, in behalf of the party opposing the application, to supersede or supply defects in the

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original proof, though the application to vacate be founded only on the papers on which the order or warrant was granted." I think it plain that the privilege conferred by section 822 is the application to a pending proceeding of a "remedial provision" "not inconsistent with the proceedings" taken prior to the time the Civil Practice Act took effect There was the order of arrest. That was a "provisional remedy" so pronounced by statute for many years. Complaint is made of the quality of the proof offered as a basis for the order. Permitting the plaintiff to supply the shortcomings by additional or better proof is to my mind fully "consistent" with the step already taken. The next criticism which defendant advances is that section 822 is limited to supplying "defects" and does not reach the dignity of allowing by new affidavits proof of showing a right to arrest where such was lacking in the original papers. Reading section 822 as a whole in conjunction with the intention of its framers, I think its purpose was to permit this to be done. In the note to section 822 contained in Clevenger's Supreme Court Practice, which is there stated to be the revisers' note, speaking of the holding in *Sulzbacher* v. *Cawthra,* 14 Misc. Rep. 545, where *new proof was received to support an attachment,* it is said: "The second sentence of the proposed section broadens somewhat the rule laid down in the above case, in that it authorizes the court or judge to allow a plaintiff to oppose by new proof a motion to vacate on the original papers. Inasmuch as the court has inherent power to allow a defendant to renew the motion to vacate, no injustice would ensue to a defendant who, in good faith, proposed to traverse or avoid the new proof adduced by plaintiff." I quote, also, from the paper read by Hon. J. Henry Walters, formerly chairman of the joint legislative committee on

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the simplification of civil practice at the annual meeting of the New York State Bar Association, which will be found at the beginning of Parsons' Practice Manual: "Uniformity in Provisional Remedies. A number of new sections relating to orders of arrest, temporary injunctions and warrants of attachment, are included in the Civil Practice Act, making the practice in these proceedings as uniform as possible so far as relates to the application for the order or warrant, the proof on the application or hearing, the granting of the remedy, the security required, the recital of grounds, *new proof on an application to vacate,* and the granting of the relief after a counterclaim has been interposed. (C. P. A. §§ 814–825.) In addition to making the provisions more uniform, a number of sections relating to the various provisional remedies have been clarified in language and a number of amendments have been made to existing practice in the interest of simplicity." The language of section 822 seems plain to me. It allows "new proof in behalf of the party opposing the application to *supersede* or *supply* defects in the *original proof.*" I think there can be no doubt as to the practice intended, and that new proof on an application to vacate an order of arrest in support of the order may be received. Service is hereby directed of copies of plaintiff's new affidavits upon the attorneys for the defendant who are hereby given five days after such service within which to reply thereto if so desired.

Ordered accordingly.

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In the Matter of the Application of THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of FREDERICK A. WALTER and Another, for a Peremptory Writ of Mandamus, against ABRAHAM KAPLAN, WILLIAM DRENNAN and THOMAS R. KILLILEA, Composing the Municipal Civil Service Commission of the City of New York.

(Supreme Court, Kings Special Term, December, 1921.)

Civil service — eligible list — city of New York — mandamus — writ will not issue when unavailing — civil service commission has no power to revive an expired eligible list — mandamus does not relate back to time of accrual of right thereto.

Mandamus lies only when the relator has a clear legal right to the remedy and when it is within the power of the officer to whom the writ is directed to perform the required act or duty.

The rule that the writ will not issue when it would be unavailing for want of power applies although the want of power is due to the fault of the officer to whom the writ is directed.

Where there is no eligible list, the specific provisions in the rules of the state civil service commission or of a local civil service commission for temporary and provisional appointments, negative the contention that either of said commissions has power to revive an expired eligible list.

When two motions for peremptory writs of mandamus to compel the civil service commission of the city of New York to certify the names of the relators for promotion to the rank of lieutenants in the fire department were denied on September 29, 1921, and affidavits purporting to show that a certain eligible list for the position of engineer of steamer, which expired July 29, 1920, was thereafter revived and certification made therefrom, were presented upon a motion for a reargument, presumably to show that a precedent exists for the revival of an expired list. *Held,* that the issue raised by a denial of these facts, in an opposing affidavit, was of no relevancy, and the said civil service commission had no power to revive an expired eligible list.

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A contention that the mandamus proceedings, when instituted, related back to the time of the accrual of the right thereto, held untenable.

APPLICATION for reargument of two motions for peremptory writs of mandamus.

David F. Price, for relators.

John P. O'Brien, corporation counsel (Wm. B. Carswell and Joseph P. Reilly, of counsel), for respondent.

FABER, J. Application for a reargument of two motions for peremptory writs of mandamus to compel the civil service commission to certify the names of the relators for promotion to the rank of lieutenants in the fire department. The motions were denied on September twenty-ninth. The facts are sufficiently stated in the memorandum then filed. On this application affidavits are presented which purport to show that a certain eligible list for the position of engineer of steamer, which expired July 29, 1920, was thereafter revived and certification made therefrom. Presumably the purpose of these affidavits is to show that a precedent exists for the revival of an expired list and a certification therefrom. These facts are denied in an opposing affidavit. But the issue thus raised is of no relevancy in the absence of power in the commission to revive an expired eligible list. If such power exists, resting either in statutory enactment or judicial decision, it has not been called to my attention. Moreover, the specific provisions in the rules for temporary and provisional appointments when there is no eligible list negative the contention that power exists in the commission to revive an expired list. State Rules, rule 8, subd. 4; Municipal Rules, rule 12, subd. 4. With the exception of the affidavits referred to no new facts are presented on this application.

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Counsel for the relators reiterates, with great earnestness and much plausibility, substantially the same arguments presented on the original motion. He contends that the right to a mandamus accrued on August first and September first, respectively; that the pendency of the *Barthelmess* case justified the delay in instituting such proceeding; and that, when instituted, the proceeding related back to the time when the right accrued and was, therefore, maintainable, although the eligible list had expired. I wish the contention were sound, for my sympathies are with the relators; but, after a careful reconsideration I am unable to change my views.

Rule 11 provides that upon notification by the appointing officer, the commission shall thereupon certify from the eligible list the three names at the head thereof. Rule 12, subdivision 4, as already stated, provides for temporary appointments in emergencies where it is not practicable to certify a person from the existing list or to conduct an examination in the absence of such a list in time to meet the emergency. These and other provisions, with the exception noted, require that appointments be made from existing eligible lists. Provisions of similar import are found in the state civil service rules. Rule 8, subds. 2, 4. In the present case, the eligible list had expired when the application for a mandamus was made. An order granting the motion would have required certification from a nonexisting, expired list. Mandamus lies only when relator has a clear legal right and when it is within the power of the officer, to whom the writ is directed, to perform the required act or duty. The writ will not issue when it would be unavailing for want of power. And the rule applies although the want of power is due to the fault of the officer to whom the writ is to be directed. Throop Pub. Off. § 823;

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People ex rel. Stevens v. *Hayt*, 66 N. Y. 606; *Public Service Commission* v. *International Ry. Co.*, 224 id. 631; *State* v. *Archibald*, 43 Minn. 328, 332.

The contention that the mandamus proceedings, when instituted, related back to the time of the accrual of the right, is untenable. A final judgment in an action to enforce an existing right may, for certain purposes, relate back to the time of the accrual or assertion of the right; but it is a novel proposition that a lost right may be revived by an action to enforce it, upon the theory that the action must be regarded as brought of the date when the right was in existence and so legally enforcible. Counsel seemingly places an abstract right to invoke a remedy in the same category as a pending action. But he is, I think, mistaken. A pending action will preserve the right until final judgment. But a right to invoke a remedy may be lost unless asserted within some designated period. Thus a judgment protects the right from the time the action was begun although the Statute of Limitations has run in the interval; but the institution of the action after the statute has run, however excusable the delay, does not relate back and so preserve the right.

Counsel assumes a case where the commission has failed to certify for a year and has then wrongfully certified the last name on the list and immediately thereafter promulgated a new list. He asks if such a termination of said eligible list would deprive those whose names appear thereon of the right to seek justice in a court of law? It seems to me the answer is, the commission is required to certify within a reasonable time after a request is received from the appointing officer. "The commission shall thereupon certify" is the reading of the municipal rule, and "shall thereupon as soon as practicable certify" is the

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wording of the state civil service rule. All persons whose names appear on an eligible list are chargeable with knowledge of these rules; and also with knowledge that a new list may not be promulgated without open competitive examination. In the case supposed, a person entitled to be certified within a reasonable time should begin proceedings for the protection of his rights within the year or before the promulgation of a new list. If he failed to do so I think his rights under the expired or superseded list would be irrevocably lost. The eligible list does not create an absolute, vested legal right, which continues for an indefinite period, but only a qualified right to be certified, with two others, as eligible for appointment. And the certification, when made, remains in force only a limited period of time and in any event does not extend *beyond the life of the eligible list.* Rule 11, subd. 5. Thus, when the eligible list expires, the quality of eligibility for appointment ceases and the potency of the certification is destroyed. Jurisdiction is then gone and any official action on the expired list is nugatory. Such was the rule at common law where a statute was repealed or expired by its own limitation. Endl. Stat. § 479. Radical changes in the former rule are now effected by the General Construction Law (§§ 93, 94). See, also, McKinney's Consol. Laws, Book 1, Report of Consolidators Statutes and Statutory Construction, §§ 181, 182. Sections 93 and 94 cited have reference to legislative repeals. Conceding that civil service rules have the force and effect of statutes, it is doubtful if these sections preserve any rights under an expired eligible list. The purpose of these sections was to prevent the injustice growing out of the common law doctrine as to the effect of a common law repeal. But eligible lists under the Civil Service Law

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are not repealed. The duration of their life is fixed by statute and they expire by operation of law at the period so fixed. And every person, having rights thereunder, is chargeable with notice that the continuance of such rights is limited by the duration of the life of the lists.

Counsel now, as well as on the argument of the original motion, relies, largely, upon the case of *People ex rel. Tierney* v. *Scannell*, 27 Misc. Rep. 662. In that case no question of an expired list was involved. The case is an authority to the effect that a valid excuse may exist for delay in instituting proceedings to enforce an existing, continuing right, but is scarcely an authority that such an excuse is also potent to resurrect an expired statute or revive a right that perished with its expiration. The motion should be denied.

Motion denied.

In the Matter of Proving the Last Will and Testament of CORNELIUS S. PINKNEY, Deceased.

(Surrogate's Court, New York County, December, 1921.)

Wills — where there is a right of trial by jury in two contested probate proceedings the proceedings will not be consolidated — last will must be tried first — Surrogate's Court Act, § 65.

Under section 2535 of the Code of Civil Procedure, now Surrogate's Court Act, section 65, consolidation presupposes the pendency of two or more proceedings, and where upon an application for an order of consolidation and for the framing of questions for a jury upon the issues of due execution, testamentary capacity and undue influence arising out of four wills alleged to have been made by decedent, it appears that no petition has been filed for the probate of either of the two intermediate instruments, the application must be denied as to them.

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The last will which in terms revoked all prior wills cannot be considered as codicillary to the first will and must be tried first in a separate proceeding and the application for an order of consolidation will be denied *in toto*.

MOTION for consolidation of probate proceedings.

Spitz & Bromberger (Henry W. Jessup, of counsel), for motion.

Thomas E. Rush (Harold E. Lippincott, of counsel), opposed.

COHALAN, S. This is an application for an order of consolidation and for the framing for jury trial of the questions of due execution, testamentary capacity and undue influence arising out of four wills of the decedent. The wills are dated, respectively, January, 1921, December 21, 1920, December 15, 1920, and June 28, 1918. The first questions relate to the validity of the 1921 will. If probate of that be denied, the jury is to answer the questions relating to the will of December 21, 1920, and if probate again be denied, like questions are to be answered in reference to the two remaining wills in the same order.

I am of the opinion that the application should be denied. Two of the wills are not the subject of any proceeding in this court. No petition has been filed for the probate of the will dated December 15, 1920, or that dated December 21, 1920. There can be no issues relating to them until objections are filed. Objections cannot be presented until probate petitions are filed. Consolidation presupposes the pendency or existence of two or more proceedings. Code Civ. Pro. § 2535, now Surrogate's Court Act, § 65. Therefore, the application cannot be entertained, so far as it

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prays for consolidation and framing of issues relating to the two intermediate wills.

I also decide that the proceedings for probate of the 1921 and 1918 wills should not be consolidated.

There are two cases which seem to warrant the granting of this motion. *Matter of Potter*, 94 Misc. Rep. 12; *Matter of Potter*, 172 App. Div. 458. The two decisions were in different applications in the same estate. In the appeal the question before the court was whether the petitioner for probate of a later will should be permitted to discontinue that probate proceeding while a proceeding to prove an earlier will was pending. The Appellate Division, third department, affirmed on the opinion of the county judge, acting as surrogate, in the court below. The facts as to consolidation stated in the opinion cannot be reconciled with those later stated by another acting surrogate (94 Misc. Rep. 12), when he seems to have ordered a consolidation of the two proceedings. The moving party herein relies upon the following statement, at page 461 in the opinion adopted by the Appellate Division: "* * * All the writers on Surrogate's Court practice are a unit on the proposition that where two instruments are propounded by different parties as wills, and several applications made for probate they will be consolidated and tried together as one proceeding."

No text-book writer had said that where there was a right of trial by jury in two contested probate proceedings, they should be consolidated. There was then no reported case in which such consolidation was ordered. The court below, as well as the Appellate Division, either overlooked the important fact that the issues were triable by jury, or assumed that the existing practice would apply to jury cases.

Prior to the advent of jury trials in Surrogates'

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Courts, there was no difficulty in consolidating contested probate proceedings. Where a later will was produced, while a prior will was being proved, the surrogate directed the filing of a petition for the probate of such later will. When this was done, both proceedings were consolidated and both trials proceeded as one. The court took proof of the two instruments offered and determined which was the last will and testament. *Carle* v. *Underhill*, 3 Bradf. 101. If, before trial, two contested probate proceedings were pending, the surrogate often found it convenient to try and hear them together. *Van Wert* v. *Benedict*, 1 Bradf. 114. Such procedure in non-jury cases was economical and practicable. It does not follow, however, that it is adaptable to jury cases. In a trial before the surrogate without a jury, he has no difficulty in applying to each will the testimony that is relevant only to that particular will. Usually, he first takes up the issue of the validity of the last will and eliminates from consideration any evidence relating to the validity of the other will. If the last will is valid, the surrogate has to go no further. Its probate frequently ends the litigation.

With trial by jury, numerous difficulties to such procedure readily suggest themselves. Whether the decedent was incapable or was under restraint in 1921 may be a very different question from that of his competency and freedom from restraint in 1918, more than two and one-half years before. The proponent of one will is the contestant of the other. If all issues were tried together, which side would open and close the case?

In closely contested cases, the issue of testamentary capacity usually involves an inquiry into the whole life of the testator. Much of this evidence in a probate contest is received for a limited purpose. Evi-

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dence of testator's conduct, manner of doing business, correspondence, declarations, etc., is received, not for the purpose of showing the truth or falsity of such statements, but to disclose state of mind, strength or weakness of will, capacity, or incapacity or susceptibility to undue influence. Evidence relevant to the issue of testamentary capacity may be irrelevant to the issue of undue influence. Evidence received on the issues of capacity and undue influence may be irrelevant to the *factum* of the will. Questions of fact as to the formalities of execution call for further accurate and specific instructions to the jury. In the probate of any given will, there may be presented to the jury several issues, numerous minute instructions, a mass of evidence to be considered for a limited purpose only in its application to one issue, and perhaps not to be considered at all in deciding other issues. Thus, a probate jury is required to exercise powers of unusual discrimination. The multiplication of issues and questions by consolidation would only be heaping "Ossa on Pelion." It would necessarily subject a jury to a consideration of such a mass of technical detail that its verdict might seem to come from confusion or speculation rather than from understanding. The vulnerability of such a verdict is obvious. Of what use would it be to "state distinctly and plainly each question of fact to be tried" (Surrogate's Court Act, § 68), as is now done in jury trials in this court, if confusion will be introduced by multifarious questions relating to various wills? Suppose the jury found in favor of the earlier will. Error in the admission of evidence relevant only to the later will might be considered so prejudicial to the whole case by an appellate court as to require a reversal. There would be no way of guarding against such a possibility. A repetition of warnings to the jury

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and an omnibus injunction at the end of the case might not be held sufficiently curative.

The 1921 will has a clause revoking all prior wills. There is no ground, therefore, for the contention that the last will may be codicillary to the will of 1918.

It is plain that it would be impracticable to have a single trial of such a jumble of issues. If consolidation were ordered, it may be assumed that the trial judge, in his discretion, would first submit to the jury the questions relating to the last will only. The other questions would be reserved for proof and submission at a later day, in the event that the last will were declared invalid. In the meantime, there would be the motion to set aside the verdict and, possibly, an appeal.

If, in effect, there must be separate trials of the issues relating to each will, consolidation would serve no useful purpose. Although this court has had considerable probate litigation in estates where there were several wills presented for probate by the surrogate with a jury, no request for consolidation has ever been made. The last will has always been tried first in a separate proceeding for that purpose.

Settle order on notice, denying this application for consolidation.

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In the Matter of the Petition of KINGS COUNTY TRUST COMPANY to Render and Settle its Account as Substituted Trustee of and Under the Last Will and Testament of PETER AITKEN, and to Obtain a Judicial Determination as to the Validity, Construction or Effect of the Disposition of Property Contained Therein.

(Surrogate's Court, Kings County, December, 1921.)

Wills — husband and wife — joint tenants — tenants by the entirety — widow's election to receive benefits under will of deceased husband permits title to real estate which was owned by them jointly to pass under the will of her deceased husband.

Although decedent and his wife held certain real estate as joint tenants, which upon his death passed by right of survivorship to her, he assumed to dispose of the same by a will establishing a trust of his entire estate for her benefit during life and upon her death directing the payment of certain legacies, the residue to be divided into four equal parts as to each of which he created further separate trusts. By a codicil which revoked one of said trusts, created primarily for the daughter of testator, she was given, free from any rent or other charge, the use and occupancy for life of a part of the house upon said real estate, with remainder to a grandson of testator and his heirs forever. The codicil also provided that during the daughter's life, the rent of the other part of the house should be collected by the executor as part of the residuary estate and applied to the payment of taxes, insurance and repairs. At the death of the testator, provided the fair and reasonable market value of the premises did not equal one-fourth of the residuary estate, the executor was directed to pay to the daughter, in cash, the difference between the appraised value made by the executor as directed and the one-fourth part of the residuary estate. Until her death, ten years after that of her father, the daughter occupied her part of the house with the consent of her mother. Thereafter, and for a nominal consideration, the widow, who during her lifetime had accepted the income of the trust created for her by her husband's will, conveyed the premises to the devisee thereunder. In a proceeding for the judicial construction of a

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will, *held*, that the widow's acceptance of the income of the trust constituted an election on her part to accept the provisions of the will and to permit the premises of which she was the owner to pass under the devise thereof contained in her husband's will.

The conveyance of the premises having been made with full knowledge of the facts of the situation must be taken as an open ratification of the testator's act in assuming to make the devise and as an act on the part of the widow in furtherance of her election to abide by the terms of her husband's will.

In the circumstances, for the purpose of determining the amount of cash presently payable to the estate of the deceased daughter in accordance with the codicil, the premises in question must be deemed to pass to the testator's grandson by virtue of the will and a claim that the full one-quarter share of the residue is now payable to the next of kin of the deceased daughter as if the said premises formed no part of decedent's estate and were not in anywise affected by his will, is untenable.

PROCEEDING for judicial construction of will on settlement of trustee's account.

Brower, Brower & Brower, for accountant, Kings County Trust Company.

James Gray (Frederick A. Keck, of counsel), for respondents Margaret McLaren King, Robert McLaren, George A. McLaren, Lomon Hill McLaren, Peter McLaren and Arthur McLaren.

Thomas Kelby, special guardian for Edward I. McLaren and Christina D. McLaren.

WINGATE, S. The question arising for decision is as to whether the premises known as No. 257 Eleventh street, in the borough of Brooklyn, shall be treated as a part of the estate of this decedent, and its appraised value taken into consideration in determining the amount of money now to be paid to the representative of Christina McLaren in satisfaction of the legacy bequeathed to her by the codicil to decedent's will.

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These premises were held by the decedent and his wife, Christina Aitken, as joint tenants and at his death passed by survivorship to her. Despite this fact the decedent has assumed by his will to dispose of them.

His will established a trust of his entire estate for the benefit of his wife during her lifetime, and upon her death directed the payment of prescribed legacies to persons named and the residue then remaining to be divided into four equal parts, as to each of which parts he created further separate trusts.

We are now concerned only with the trust created primarily for the daughter, Christina McLaren. The provisions of the will with respect to this trust were revoked by the codicil, which in lieu thereof substituted the following:

"I give and bequeath unto my daughter Christina McLaren the use and occupance, free from any rent or other charge during her lifetime, of the basement and first floor of my house known as #257 Eleventh Street, Borough of Brooklyn, and at her death, I give, devise and bequeath the said house to my grandson, Lomon Hill McLaren, and his heirs forever; and I hereby provide that during the lifetime of my daughter Christina McLaren, the rent of the second or top floor of said house No. 257 Eleventh Street shall be collected by my executor hereinafter named, to be part of my residuary estate, said rent first to be applied to payment of taxes and insurance and the balance to be used on repairs.

"I further provide that at my death the said house No. 257 Eleventh Street shall be appraised by my executor hereinafter named, at its fair and reasonable market value, and provided that such value does not equal a one-fourth part of my residuary estate, then and in that event I direct my executor hereinafter named, to pay to my said daughter Christina

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McLaren, in cash, a sum which shall equal the difference between such appraised value and such one-fourth part of my residuary estate."

Peter Aitken, the decedent, died February 2, 1905. Thereafter, and on October 6, 1915, the daughter, Christina McLaren, died. The widow, Christina Aitken, died on November 30, 1919.

During her lifetime, after her father's death, the daughter occupied the first floor and basement of the premises in question with the consent of Christina Aitken. The widow during her lifetime accepted the income of the trust created for her benefit by her husband's will. While it is not clear that prior to the daughter's death the widow knew that the premises in dispute belonged to her, yet she did become possessed of this knowledge at or about the time of the death of the daughter. After the acquisition by her of this knowledge, the income of the estate was paid to her, as before, by the trustee and accepted by her. In 1916 the widow, for a nominal consideration, conveyed to Loman Hill McLaren, the devisee named in the will of the decedent, the premises assumed to be devised to him by the will.

The next of kin of Christina McLaren assert that the value of these premises must not be taken into consideration in determining the sum now payable to the estate of Christina McLaren, but that the full one-quarter share of the residue is now payable to them as if the Eleventh street premises formed no part of the estate and were not in any wise affected by the will of the decedent. This claim is without merit and cannot be sustained.

While these premises constituted no part of his estate and did after his death belong in severalty to his widow, Christina Aitken, yet by his will and codicil he sought to dispose of them. This he could not do

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unless by his will he gave to his widow something of value which put her to an election, either to abide by the terms of the will or to retain her own and refuse to accept that which her husband designed for her by his will. Under the facts of this case the widow was put to an election.

The acceptance of the income of the trust created by the will of the decedent, under the circumstances already referred to, constituted an election upon her part to accept its provisions and to permit the premises, No. 257 Eleventh street, which she owned, to pass under his devise therein contained. Moreover, her conveyance of the premises, in 1916, to Loman Hill McLaren, when the facts of the situation were fully known to her, must be taken as an express ratification of the testator's act in assuming to devise them and as an act upon her part in furtherance of her election to abide the terms of his will. *Bectson* v. *Stoops,* 186 N. Y. 456.

The premises must be deemed in the circumstances to pass to the grandson, Loman Hill McLaren, by virtue of the will for the purpose of determining the amount of cash now payable to the estate of Christina McLaren, as in the codicil provided.

It follows that there is now payable to the administratrix of Christina McLaren only so much money as, together with the appraised value of such premises, will equal one-fourth of the testator's residuary estate, as specified in his codicil.

The will contains a valid power of sale in the trustee authorizing the disposition of the lands of which the testator died seized, for the purpose of distribution in conformity with the provisions of his will. This power, therefore, affects the premises known as No. 41 Fourth place.

Submit decree accordingly with notice of settlement.

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In the Matter of the Judicial Settlement of the Account of FREDERICK H. SANBORN, as Executor of JOSEPHINE M. L. FLEET, a Deceased Executrix of ROBERT S. FLEET, Deceased.

(Surrogate's Court, Kings County, December, 1921.)

Wills — devise — discretionary power of sale — taxes and carrying charges on unproductive real property payable by life tenant.

The general rule is that taxes and carrying charges on real property are payable by the life tenant and are not chargeable either upon the land, the proceeds of its sale or upon the interests of the remaindermen, unless the will expressly so directs.

A will containing only a discretionary power of sale over the real estate and under which testator's widow, who was also his executrix, took a life interest in the residue of his property, real and personal, devised and bequeathed whatever was left of the residuary estate at her death, after payment of money legacies payable therefrom, to the brothers and sisters of testator in equal shares. The residuary estate consisted of about $250,000 worth of income producing real and personal property, and $160,000 worth of vacant lots producing no income. *Held,* that an objection to the payment from the principal of the estate for taxes on the unproductive property still unsold must be sustained and the account of the executor of the deceased executrix surcharged accordingly.

SETTLEMENT of account of executor of deceased executrix.

Baylis & Sanborn, for accountant.

John M. O'Neill., for contestants.

Joseph A. Kennedy, special guardian.

WINGATE, S. Upon the accounting of the executor of the deceased executrix, who was also the widow of

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the testator and the life tenant under his will, objection is made that such life tenant was charged by law with the duty of paying taxes and other carrying charges which accrued upon the property of the decedent during the period of her life estate, and that the payment of taxes from the principal of the estate was not warranted.

The general rule is that taxes and carrying charges on real property are payable by the life tenant and are not chargeable upon the land, or upon the proceeds of its sale, or upon the interests of the remaindermen therein, unless the will contains a plain direction to this effect.

The will of the testator contained provisions for the establishment of a trust in the event that a child or children should have survived him. No child having survived him these trust provisions never came into force.

The provisions of his will which became operative bestowed a money legacy upon a brother and gave to his widow a legal life estate in the residue of his property, real and personal. Upon the death of the widow money legacies, payable out of the residue, were given to persons named and after their payment, whatever was left of the residuary estate, real and personal, was given, devised and bequeathed to the brothers and sisters of the testator, to be equally divided between them. The estate in which the widow received a life interest consisted of approximately $250,000 worth of income producing real and personal property, and $160,000 of vacant lots, producing no income. All but $20,000 worth of this vacant property has been sold. The question now requiring decision relates only to the unpaid taxes for the years 1917, 1918 and 1919 on the unsold land.

The power of sale conferred upon the executors of

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this will is discretionary and, indeed, is conceded to be discretionary by the accountant in his memorandum submitted upon this argument. Had the power been mandatory, an equitable conversion would have resulted, and this would have required the payment of taxes and other carrying charges on the decedent's unproductive lands out of principal. This power, in terms discretionary, is not made imperative by any language found elsewhere in the will, or by the situation of the estate. Had the trust provisions become effective a different question might have been presented.

It is argued by the accountant that the case of *Spencer* v. *Spencer,* 219 N. Y. 459, is authority for the payment out of principal of taxes upon unproductive lands, even if the power be purely discretionary. The decision in that case is to the effect that the power contained in the will then under review though in terms discretionary, was by the general intendment of the will made mandatory, and that such discretion as was conferred upon the trustees was only as to time. This appears not only from a reading of the opinion in the *Spencer* case itself but also from the discussion of that decision in the opinion of the court in *Furniss* v. *Cruikshank,* 230 N. Y. 495, 500, as follows: "The latest case in this state on the subject is *Spencer* v. *Spencer* (219 N. Y. 459). The decision is that where a testator creates a trust largely of unproductive real estate with an imperative power of sale, so that an equitable conversion is effected, although the time of sale may be left to the discretion of the trustees, then it is not to be assumed that he intended that the first beneficiary should be deprived of all income to the time of sale for the profit of the remainderman, if the sale is delayed because of circumstances. In so

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holding, we but followed our decision in *Lawrence* v. *Littlefield* (215 N. Y. 561, 568)."

In the *Spencer, Furniss* and *Lawrence* cases there was ample evidence in the will, aside from the language conferring the power of sale, which evidenced the intention of the testator in the several wills considered, that the principal should bear the carrying charges of unproductive lands, and that the general rule requiring payment of these charges out of income should not be applicable. The will now being considered is bare of any language pointing to such intent unless it be found in the provisions concerning the power of sale. This language in itself does not confer an imperative power, as already said, and in itself discloses nothing that would require a departure from the normal rule that requires that the life tenant shall bear the carrying charges of the property devised for life.

The objection to the payment of $563.47, out of the principal of the estate for taxes on unproductive property still unsold, must be sustained, and the accountant will be surcharged accordingly.

The other objections are disposed of by the concessions of the accountant contained in his brief.

Settle decision and decree on notice.

Ordered accordingly.

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Misc.] Surrogate's Court, Kings County, December, 1921.

In the Matter of the Appraisal for the Purpose of the Transfer Tax upon the Estate of CLARA KOCH, Deceased.

(Surrogate's Court, Kings County, December, 1921.)

Transfer tax — husband and wife — joint tenancies in personal property created prior to the addition of subdivision 7 to section 220 of the Tax Law (Laws of 1915, chap. 664) and tenancies by the entirety created prior to the amendment of said subdivision by chapter 323 of the Laws of 1916 are taxable upon one-half of their respective values upon the death of one of the tenants — such tenancies created subsequent to the above enactments taxable at full value — contribution by survivor to fund immaterial.

Where a joint tenancy in personal property was created prior to the addition of subdivision 7 to section 220 of the Tax Law (Laws of 1915, chap. 664) and a tenancy by the entirety was created prior to the amendment of said subdivision by chapter 323 of the Laws of 1916, one-half of the value of the personal property and one-half of the value of the real property is taxable upon the death of one of the tenants. Where such tenancies were created subsequent to each of the enactments above referred to the entire value of the personal property and the real property is subject to a transfer tax.

Proof that the survivor contributed all of the funds that went into the purchase of the properties was not a reason for a modification of the order made herein, and the same is affirmed.

APPEAL from order of transfer tax appraiser.

Hamilton & Stratmann, for Frederick A. Koch, appellant.

Marcus B. Campbell, for state comptroller, respondent.

WINGATE, S. The order appealed from is affirmed. The imposition of a tax upon the transfer of one-half of the value of the personal property held by the decedent and her husband in joint tenancy, and upon

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the transfer of one-half of the value of the real property held by the decedent and her husband as tenants by the entirety, where the joint tenancies in the personal property were created prior to the addition of subdivision 7 to section 220 of the Tax Law, by chapter 664 of the Laws of 1915, and where the tenancies by the entirety in lands were created prior to the amendment of such subdivision by chapter 323 of the Laws of 1916, is proper, despite the fact that there was no contribution by the decedent to the property now going to the surviving husband. *Matter of McKelway,* 221 N. Y. 15; *Matter of Beresford,* 183 App. Div. 947; *Matter of Moebus,* 178 id. 709; *Matter of Teller,* Id. 450; *Matter of Weissbach,* 111 Misc. Rep. 501; *Matter of Perry,* 104 id. 115; *Matter of Greim,* 183 N. Y. Supp. 149.

The tax imposed upon the entire value of personal property, held by the decedent and her husband as joint tenants, where the tenancies were established after the addition of subdivision 7 to section 220 of the Tax Law in 1915, is likewise in accord with the statute and with the cases construing it. Similarly, the tax imposed upon the entire value of the real property held by the decedent and her husband as tenants by the entirety, where the tenancies by the entirety were created after the amendment of 1916, is also correct. There is no reason for the modification of the taxing order because of the proof that the survivor contributed all the funds to the purchase of the properties so transferred and the decedent contributed nothing.

There is authority for the view of the appellant that there should be no tax imposed in such instances where the survivor contributed all of the funds that went into the purchase of the personal property held in joint tenancy and of the lands held in tenancy

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by the entirety. The decisions so holding proceeded upon the theory that on the death of the first tenant to die there was no donative transfer to the survivor who had made the whole contribution and who was only receiving back his own. *Matter of Weissbach, supra; Matter of Reardon,* 182 N. Y. Supp. 218.

The weight of authority, however, is that the legislative intent was, by the amendments of 1915 and 1916, referred to *supra,* to tax the entire value of estates held in joint tenancy or in tenancy by the entirety, where these tenancies had their inception after the enactments mentioned, and this without regard to the proportion of contribution by the persons interested. *Matter of Dolbeer,* 226 N. Y. 623; *Matter of Kelley,* 115 Misc. Rep. 357; *Matter of Chase,* 112 id. 684; *Matter of Bigelow,* 108 id. 601.

The cases of *Matter of Buchanan,* 184 App. Div. 237, and *Matter of Van Vranken,* 110 Misc. Rep. 84, are distinguishable from that at bar. Under their facts the courts found that no joint tenancy was created, that the funds on deposit in joint names were solely owned by the depositor, and that no right of survivorship was intended by the depositor to pass or did pass at his death to the person whose name was associated with his in the form of the account. There being no transfer effected, no transfer tax could be imposed.

Ordered accordingly.

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CONTINENTAL COTTON COMPANY, INC., Plaintiff, v. ISIDORE G. MANN, Defendant.

(City Court of the City of New York, December, 1921.)

Sales — contracts — damages for failure to deliver — time of delivery — nominal damages — Personal Property Law, § 148.

Where a contract for the sale and delivery of five hundred bales of cotton linters fixed no time for delivery except that the goods were to be sent in shipments of not less than sixty bales at a time, and the seller upon making delivery of one installment repudiates the contract, the measure of damages in an action by the buyer for breach of the contract is by section 148 of the Personal Property Law fixed at the difference between the contract price and the market price of the goods at the time of defendant's refusal to deliver.

Although the writings were silent on the point, the question whether any agreement as to the time of performance was reached by parol was submitted to the jury under a charge that if they found there was such a time fixed, the market conditions as of that time were the proper criterion of damages and that if they found no time fixed they might determine what was a reasonable time for performance and measure the damages accordingly. Later, upon request, the jury were correctly instructed that if they found no time for delivery was fixed, the damages were to be computed as of the time of the breach of the contract. *Held,* that a motion to set aside a verdict for nominal damages will be denied.

MOTION to set aside verdict.

Barnett E. Kopelman, for plaintiff.

Sanders, Gelenko & Polstein (Leon Sanders, of counsel), for defendant.

CALLAHAN, J. This is a motion by plaintiff to set aside the verdict of a jury in its favor for nominal damages. The court ruled that the evidence showed a breach by defendant of its contract to deliver a

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quantity of cotton linters, but submitted the question of damages to the jury. The contract was for the sale and delivery of 500 bales of cotton linters. It fixed no time for delivery except that it provided that the goods were to be sent in shipments of not less than sixty bales at a time, and provided further that plaintiff (the buyer) had the right to free storage of the goods to a date specified. The breach was an anticipatory one in that only one installment of about sixty bales had been delivered when, on August 10, 1921, the defendant wrote to plaintiff repudiating the contract. The question arises as to what is the proper time as of when damage is to be measured under these circumstances. This question was long the subject of much dispute at common law. In this state there was early dictum, if not specific authority, holding that when such anticipatory breach occurred it was as of the time of the breach and not of performance that damages were to be fixed. *Masterson* v. *Mayor of Brooklyn,* 7 Hill, 61. This case contained a strong dissenting opinion to the effect that the market at the time of performance was to be the measure. The more recent authorities in this state were apparently inclined to follow the view expressed by the dissenting justice. *Windmuller* v. *Pope,* 107 N. Y. 674; *Todd* v. *Gamble,* 148 id. 382; 2 Sedg. Dam. (9th ed.) § 636-a, p. 1243, § 636-l, p. 1266. I feel, however, that, whatever may have been the rule at common law, the measure of damage is now fixed by the terms of the Personal Property Law. This statute covers anticipatory as well as other breaches. *Goldfarb* v. *Campe Corp.,* 99 Misc. Rep. 475. Section 148 of the Personal Property Law provides that the measure of damage is the difference between the contract price and the market price of the goods at the time or times they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver. Action may be brought before

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the time fixed for performance may have expired. *Windmuller* v. *Pope, supra.* Only one action may be brought, and all damages, existing and prospective, must be claimed and may be recovered in such action. *Pakas* v. *Hollingshead,* 184 N. Y. 211. The novel feature in the instant case arises in considering the effect of the statutory provision that where no time is fixed for performance, then the market at the time of the breach is to govern, in connection with the well-settled rule of common law that in the absence of a time fixed by the contract the law fixes a reasonable time after the making of the contract as the time for performance. Assuming, as in the case at bar, that it might be held or found by the jury from the evidence that a reasonable time for deliveries would be some day subsequent to the breach, at which time the market price of the commodity might be far different from that on the date of the breach, I am constrained to hold, nevertheless, that under the plain language of the statute the present rule in this state is that the question of reasonable time of performance is immaterial, and the damage must be assessed as of the date of breach in the absence of a provision in the contract fixing the time of performance. In the case at bar the question was submitted to the jury as to whether there was any agreement as to time of performance reached by parol, although the writings were silent on this point. They were instructed in the main charge that if they found there was such a time fixed, then the market conditions as of that time were to be used as the proper criterion. They were also instructed that if they found no time fixed, then they might determine what was a reasonable time for performance and measure damages as of that date, but later, upon request, they were advised if they found no time of delivery was fixed, then the time of breach was the

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time to be used in computation. The latter, which was the proper rule, was the one apparently followed by the jury. There was little contradiction in the evidence as to the fact that at the time of the breach, and in fact for almost a month thereafter, the market price of cotton linters was about the same as the contract rate. The jury were entitled to find no substantial damage if they measured the same as of the time of the breach. As a finding by them that there was no time agreed upon for delivery would not be contrary to the weight of the evidence, the finding of nominal damages cannot be disturbed.

Motion denied.

COLUMBIA MILLS, INC., Appellant, *v.* MACHENBACH IMPORTING CO., Respondent.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Sales — goods to be manufactured — loss in transit — when delivery to carrier passes title — allowance by seller of freight charges paid by buyer immaterial — Personal Property Law, § 100, rule 5.

In an action to recover the price of goods to be manufactured but lost in transit it appeared that plaintiff shipped the goods to defendant's place of business under a straight bill of lading. It further appeared that plaintiff, by the usual course of business between the parties, had authority, even if not expressly given at the time of the making of the contract, to deliver the goods to a carrier for transmission. *Held*, that defendant must be deemed to have impliedly consented to plaintiff's appropriation of the goods to the contract upon the delivery of the same to the carrier unless from other circumstances a contrary intent could be inferred.

A contention that such contrary intent was to be presumed by reason of the fact that though it was the custom of the parties that the defendant should in the first instance pay the

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freight charges, it was permitted to offset such charges against the purchase price, was untenable.

The order for the goods was given upon the same terms as previous orders, the invariable course of dealing being that plaintiff shipped the goods without paying the freight and deducted the charges, which defendant paid, from the agreed purchase price of the goods. *Held*, that the carrier was the agent of the defendant and that delivery to it of the goods passed the property therein to it.

The rules laid down in section 100 of the Personal Property Law made no changes in the law where under the agreement of the parties the buyer was to pay transportation charges even though thereafter he could deduct such payment from the purchase price, and the contention that under rule 5 of said section the carrier is intended to be the agent of the seller and not of the buyer is supported neither by reason nor authority, and cannot be sustained.

The rule that title to goods which were not *in esse* at the time the contract was made, does not pass to the buyer until he has had an opportunity to inspect them, held not to apply.

The judgment entered in favor of defendant based upon a holding of the trial justice that the goods were never appropriated to the contract with the consent of defendant, and that the property in the goods and the risk of loss did not pass to it upon delivery to the carrier, reversed and a new trial ordered to the end that maybe evidence tending to show more clearly the actual agreement of the parties will be given.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, in favor of the defendant.

Otterbourg, Steindler & Houston (Charles Houston, of counsel), for appellant.

David Harrison, for respondent.

LEHMAN, J. The plaintiff has brought an action to recover the agreed price of certain goods which it claims it sold and delivered to the defendant. The defendant does not deny that it agreed to buy the goods, which were to be manufactured by the plaintiff,

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but it is undisputed that it never received the goods. It appears, however, that the plaintiff shipped the goods to the defendant's place of business in Yonkers, N. Y., under a straight bill of lading, and apparently they were lost in transit. Both parties concede that the case presents only a single question of law, to wit, did the property pass to the defendant at the time when the plaintiff delivered the goods to the carrier?

The record does not clearly show whether any statement was made at the time the order was given in regard to whether the goods were to be delivered in Yonkers or whether they were to be shipped by carrier and the charges paid by the defendant. It appears, however, that the parties had been dealing together for some time, and the defendant had given the plaintiff a number of similar orders and it is undisputed that the present order was given upon the same terms as the previous orders. It is further undisputed that the plaintiff had shipped goods on the previous orders to the defendant by railroad without prepaying the freight; that the defendant had paid the freight itself on such goods, and that thereafter the plaintiff had deducted the charges paid by the defendant from the agreed price. Apparently this was the invariable course of dealing between the parties, except in one instance where plaintiff shipped goods by parcel post and had charged the defendant with the cost of carriage. Upon these facts the trial justice has decided that the goods were never appropriated to the contract with the consent of the defendant, and that the property in the goods and the risk of loss did not pass to it, upon delivery to the carrier.

The defendant seeks to sustain the judgment upon the ground that it never had an opportunity to inspect the goods, and that no title passed to it until such opportunity was given. The ordinary rule that title

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to goods which were not *in esse* at the time the contract was made does not pass to the buyer until an opportunity has been offered to him to inspect them does not apply to the present case, if the plaintiff was authorized to make an appropriation of the goods to the contract before actual delivery to the buyer. "A buyer has a right to inspect the goods offered to satisfy himself that the seller has fulfilled the authority conferred upon him to appropriate goods to the bargain, but this right to inspection is not a condition precedent to the transfer of the property in cases where the seller has been authorized to make an appropriation. If the seller conforms to the authority given him, the property passes and the buyer's subsequent inspection merely enables him to satisfy himself that because the authority given the seller was properly exercised, the property passed." Williston Sales, § 278. The plaintiff in the present case had the right to appropriate the goods to the contract by delivery to the carrier if under the contract it was the intention of the parties that at that time the property in the goods was to pass to the buyer. Section 100 of the Personal Property Law provides: "Rules for ascertaining intention.— Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * Rule 4. * * * 2. Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section one hundred and one. This presumption is applicable, although by the terms of the con-

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tract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents." In the present case the plaintiff was authorized by the usual course of business between the parties, even if such authority was not expressly given to it at the time of the making of the contract, to deliver the goods to a carrier for transmission to the defendant, and the defendant must be deemed to have impliedly consented to an appropriation of the goods at that time, unless from other circumstances a contrary intent can be inferred. The defendant contends, however, that such contrary intent should be presumed by reason of the fact that though it was the custom of the parties that the defendant should in the first instance pay the carriage charge, yet it was permitted to offset such charges against the purchase price. A similar contention, under analogous facts, was held to be without foundation in the case of *White* v. *Schweitzer,* 147 App. Div. 544. That case, however, arose under a contract which was made before the Personal Property Law was enacted, and the defendant on this appeal relies upon the express words of rule 5 of section 100 of that law, which provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." It seems to me, however, that neither on reason nor authority can the defendant's contention be sustained. The logical foundation of rule 5 is that where the contract provides for the delivery of the goods to the buyer or at a particular place without any charge to the buyer, it is fairly inferable that the parties intended that the property in the goods should not pass until such delivery was made, and that the

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carrier who transports the goods is intended to be the agent of the seller and not the agent of the buyer. Where, however, the buyer is under the contract called upon only to deliver the goods to the carrier and the seller is required before he can receive delivery to pay the carrier's charges, the mere fact that such charges are included in the purchase price and that the buyer is entitled to set them off against payment of the contract price cannot prevent the property passing to the buyer, when the goods are delivered to the carrier. Since the seller has done all that he can be required to do under the contract and has delivered the goods to the carrier with the consent of the buyer and upon the understanding that the buyer will thereafter meet the charges of the carrier, it seems evident that the carrier is the agent of the buyer and that delivery to the carrier passes the property in the goods to him. In the case of *Smith Co., Limited*, v. *Moscahlades*, 193 App. Div. 126, the court held that the rules laid down in the Personal Property Law did not change the legal effect of a "c. i. f." contract and by parity of reasoning it would appear that the same rules have made no changes in the law where under the agreement of the parties the buyer was to pay the transportation charges, even though thereafter he could deduct such payments from the purchase price. It may be that upon a new trial the evidence will show more clearly the actual agreement of the parties, but, upon the present record, judgment in favor of the defendant cannot be sustained.

Judgment should, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

WHITAKER and DELEHANTY, JJ., concur.

Judgment reversed.

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MORITZ FELSTINER and Another, Respondents, v. SAMUEL WIDELITZ, Appellant, and Others, Under-Tenants.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Evidence — landlord and tenant — summary proceedings — an unfair attempt to arouse sympathy of jury cannot be met on cross-examination by an attempt to arouse their prejudice.

On the trial of a summary proceeding the tenant testified that in a conversation with one of the landlords he was asked for an increase of rent and when he refused was told that if he did not pay something in addition on the rent he would not be able to stay in the premises "the whole time" and that he answered "I got a wife and eight children to support. Now after I put so much money in the building why don't you leave me alone and give me a chance to live? I pay always my rent on time, why bother me? I got a straight lease from the beginning. I got a straight lease for five years now. After five years, then you get the building. You got enough." No motion to strike out this testimony was made, neither did counsel for the landlords ask the trial justice to admonish the jury that they must not be influenced by any claim for sympathy on the part of the tenant. The tenant was asked on cross-examination how many leases he had and how many houses he owned and when his counsel took the objection that it was incompetent, irrelevant and immaterial, the court stated that it did not see the purpose of the question. The landlords' counsel then said: "This man had volunteered the information — and he did not do it of his own accord — that he was a man with a family of eight children — a poor man with eight children to support. My purpose is to show that this man is a man that has any number of houses that he owns in fee and dozens of houses on lease, and is a very rich man." The court stated that it made no difference whether the man was rich or poor, but when the landlords' counsel added, "I agree with your Honor entirely and I would not have brought it in out of the mouth of my client, but since he has brought it in and placed himself on the sympathy of the jury — "

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have given the defendant notice of termination of the
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lease naturally depends upon the terms of the instru-

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and Another, Respondents, v. Appellant, and Others, Under-

Department, November

...ered into a lease
... of New York. After the
... lease, the parties agreed that it
...ewed for a period of five years, expiring
...ober 1, 1923, under the same conditions as were
... in the old lease, with certain exception. The
... claim the original lease was an informal
... setting forth only a few terms and provid-
... that otherwise the lease should be upon the same
... as the lease of another building rented by this
... from the same landlords. That lease con-
... a provision permitting the landlords to ter-
... the lease upon notice after a sale of the prem-
... The tenant, on the other hand, claims that the
... lease was written out on a printed form and
... no provisions for cancellation or termina-
... The landlords have now sold the premises, and

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ment itself, but both parties claim that they have lost their respective copies of this lease. Each side presented testimony to sustain its version of the original lease, and this was the only issue presented to the jury, which brought in a verdict for the landlords.

During the course of the trial the tenant testified to a conversation which he claims he had with one of the landlords prior to the giving of notice of cancellation. In that conversation he claims that the landlord asked him for an increase of rent, and when he refused, the landlord told him that if he did not pay something in addition on the rent he would not be able to stay in the premises "the whole time," and that he answered, "I got a wife and eight children to support. Now, after I put so much money in the building why don't you leave me alone and give me a chance to live? I pay always my rent on time, why bother me? I got a straight lease from the beginning. I got a straight lease for five years now. After five years, then you get the building. You got enough." The landlords' attorney did not move to strike out this testimony, nor did he ask the trial justice to admonish the jury that they must not be influenced by any claim for sympathy on the part of the tenant, but on cross-examination they asked the tenant how many leases he had and how many houses he owned. The tenant's counsel objected to this as incompetent, irrelevant and immaterial, and the court stated that it did not see the purpose of the question. The landlords' counsel then said: "This man had volunteered the information — and he did not do it of his own accord — that he was a man with a family of eight children — a poor man with eight children to support. My purpose is to show that this man is a man that has any number of houses that he owns in fee and dozens of houses on lease, and is a very rich man." The court stated that

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it made no difference whether the man is rich or poor, but when the landlords' counsel added, "I agree with your Honor entirely and I would not have brought it in out of the mouth of my client, but since he has brought it in and placed himself on the sympathy of the jury — " the court overruled the objection. It seems to me that this constituted prejudicial error which this court cannot overlook. We cannot assume that the tenant was appealing to the sympathy of the jury when he testified as to the details of an alleged conversation. Even if he did make an improper appeal, the only remedy of the landlords would be to move for the withdrawal of a juror or an admonition to the jury to guard themselves against the effect of sympathy. Even an unfair attempt to arouse the sympathy of the jury cannot be met by an attempt to arouse their prejudice. If the courts are to do justice, litigants must be held to testimony that has a bearing on the question at issue and, even on cross-examination, to such questions as legitimately tend to impeach or discredit a witness or party. The landlords' attorney attempts to justify these questions on the ground that they affect the credibility of the tenant, but I fail to find in the testimony I have quoted any statement of the tenant that he was a "poor man" which would be discredited or rendered improbable by any evidence which would tend to show that he owned or leased a considerable number of houses.

For this reason, and without now passing upon the other alleged errors in the admission or exclusion of evidence the final order should be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

DELEHANTY, J., concurs; WHITAKER, J., dissents.

Order reversed.

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BLANCHE O. FOSTER, Respondent, v. HARRIS GOLDBERG, Sued Herein as JOHN GOLDBERG, Appellant.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Landlord and tenant — summary proceedings — rent — when prior adjudication as to rental value not binding upon parties in new proceeding.

Where at the time of the trial of summary proceedings for non-payment of rent which the tenant pleaded was unjust, unreasonable, excessive and oppressive, there was no statute making a prior adjudication as to rental value binding upon the parties in a new proceeding brought for rent of the same premises for subsequent months, a final order awarding possession of the premises to the landlord entered upon a holding of the trial justice that a prior adjudication fixing the rental value of said premises was binding upon the parties in the absence of a change of conditions, and its refusal to accept evidence which the tenant sought to introduce, will be reversed and a new trial ordered.

Whitaker, J., dissenting.

APPEAL by the tenant from a final order entered in the Municipal Court of the city of New York, borough of Manhattan, seventh district, awarding the possession of the premises to the landlord.

Abraham Harris, for appellant.

H. I. & L. Cohen, for respondent.

LEHMAN, J. On January 4, 1921, the landlord herein instituted summary proceedings against the tenant for non-payment of the previous two months' rent. The tenant pleaded that the rent demanded was unjust, unreasonable, excessive and oppressive. The

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trial took place on the 26th day of January, 1921. It appeared at the trial that the landlord had instituted similar proceedings for previous months' rent and that the court in those proceedings had fixed the rental at the amount which the landlord demanded in the proceedings now under consideration and that no facts have arisen since the period for which the prior adjudication has been made, affecting the rental value of the premises. The tenant, however, claimed and attempted to prove that the proof adduced at the previous trial by the landlord was not true and that the items of income were understated and the items of expense exaggerated. The trial justice held that the prior adjudication was binding upon the parties in the absence of a change of conditions and refused to accept the evidence which the tenant sought to introduce.

Section 7 of chapter 434 of the Laws of 1921 provides that "Where there has been an adjudication of the reasonable rental value of premises, such adjudication shall determine and be binding in any subsequent action between the same parties involving the rental value of the same premises for a subsequent period, unless the plaintiff or the defendant, as the case may be, plead and prove facts which have arisen since the period for which the prior adjudication has been made, affecting the rental value of the premises." That statute however, became the law only on April 30, 1921, and at the time of the trial there was no statute in existence which made a prior adjudication binding upon the parties in a new proceeding brought for rent of the same premises for subsequent months. Even the new statute recognized that such a prior adjudication cannot be regarded as absolutely binding under all circumstances, and in the absence of such statute either party who saw fit could

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litigate the question anew. Of course in the new litigation such party might have difficulty in overcoming the natural inclination of the trial justice to follow a previous decision rendered by himself or by a judge or co-ordinate jurisdiction, but the trial justice was bound to accept evidence which might induce him to reach another conclusion.

Final order should, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

DELEHANTY, J., concurs.

WHITAKER, J. (dissenting). I dissent solely upon the ground that it is unwise to reverse when the result of a new trial would be the same.

Order reversed.

KEY SYSTEM INSTITUTE, Appellant, *v.* PHIL WEISSMAN, Respondent.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Contracts — Sabbath laws — agreement for instruction, performed partly on Sunday, enforcible — Penal Law, §§ 2140, 2143.

An agreement to give defendant at his home a course of instruction in named subjects, though to be performed in part on Sunday, does not constitute a serious interruption of the repose and religious liberty of the community, does not infringe the inhibition of the Penal Law, sections 2140, 2143, and is enforcible.

People v. *Dunford*, 207 N. Y. 17, followed.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of Manhattan, third district, dismissing the complaint upon the merits.

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Harry Stackell, for appellant.

Jacob M. Zinaman, for respondent.

DELEHANTY, J. The action is upon a written agreement executed by the parties hereto which provides in part that plaintiff is to give a course of instruction to defendant in the three R's as well as certain other subjects named, at the home of the defendant on Wednesday and Sunday of each week. The learned court below, after a trial, found for plaintiff upon all points except one and then dismissed the complaint upon the theory that the contract was void in that it provided for a part performance on Sunday contrary to the provisions of section 2143 of the Penal Law of this state (Consol. Laws; Laws of 1909, chap. 88). The point presented for determination is not only interesting but highly important from a public standpoint. This court has held in construing certain sections of the so-called Sabbath laws, section 2140, 2152 of the Penal Law, that they are to be liberally construed, and acts done on that day, which do not disturb or interfere with others, and are not contrary to the design sought to be accomplished thereby, are not illegal. *McCormack* v. *Hazard,* 77 Misc. Rep. 190. This decision is in consonance with the rule laid down by the Court of Appeals in *People* v. *Dunford,* 207 N. Y. 17, 20, where the construction of section 2147 of the Penal Law was involved. Judge Gray writing for a unanimous bench there said: "The language of a statute intended for the public good should receive a liberal construction, undoubtedly; but that construction must be one which harmonizes with the reason of the thing. It should declare a legislative intent, which the words of the statute and contemporaneous statutory enactments, *in pari materia,* will justify." With these rules as a guide

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it remains to be determined whether the contract in suit infringes the inhibition of the section of the Penal Law involved herein. This section 2143 provides as follows: "All labor on Sunday is probibited, excepting the works of necessity and charity. In works of necessity or charity is included whatever is needful during the day for the good of the order, health or comfort of the community." It is quite apparent that the intent of this Sabbath legislation is expressed in the very first section (2140) thereof, which provides as follows: " The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, *which are serious interruptions of the repose and religious liberty of the community.*" (Italics mine.) Addressing ourselves to the facts presented, can it truthfully be contended that the giving of a lesson such as is contemplated by the contract in suit and in the very sanctity of one's home constitutes a nuisance which, as was said in *People* v. *Dunford, supra,* disturbs the public rest on Sunday, or tends to profane the day by any unnecessary or noisy conduct? True the giving of such a lesson involves labor on the part of both parties to the contract, but does it constitute a serious interruption of the repose and religious liberty of the community? If that query is answered in the negative, as I think we necessarily must, then this contract is enforceable under the authority of *People* v. *Dunford, supra.* Our attention has been called by respondent to the case of *Bilordeaux* v. *Bencke Lith. Co.,* 16 Daly, 78, as an authority in his behalf. That was a case somewhat similar in its facts to the instant case. It was decided in 1890 by the former Court of Common Pleas, a court practically of co-ordinate jurisdiction with this court, but we do not consider ourselves bound thereby

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in view of the more progressive stand taken by the Court of Appeals in *People* v. *Dunford, supra.* In agreement with the learned trial justice on all other points raised and decided by his opinion we conclude that the judgment should be reversed, with $50 costs and judgment granted in favor of plaintiff for the sum of $200 and costs.

LEHMAN and WHITAKER, JJ., concur.

Judgment reversed.

Estate of MALI KORNBLUTH, Appellant, *v.* BENJAMIN BRAND, Respondent.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Landlord and tenant — summary proceedings — holdover — lease for store purposes only — tenant removed, though residing there.

A lease of premises to be used only for business purposes may not by judicial interpretation be converted into a lease for dwelling purposes.

Where premises were leased to be used only for a grocery store, the landlord in summary proceedings against the tenant as a holdover is entitled to possession even though the tenant occupied the rear portion of the premises for dwelling purposes, and an order dismissing the proceedings will be reversed and a final order awarding the landlord possession of the premises will be granted.

APPEAL by the landlord from a final order of the Municipal Court of the city of New York, borough of Manhattan, second district, dismissing his petition for the removal of the tenant as a holdover.

Benjamin Koenigsberg, for appellant.

Samuel S. Breslin, for respondent.

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WHITAKER, J. The landlord entered into a lease with the tenant of the westerly store in premises No. 353 East Tenth street and the rooms in the rear thereof and the basement underneath with the appurtenances, for the term of two years and nine months from the 1st day of August, 1918, to April 30, 1921.

There is the following provision in the lease: "And the said party of the second part further covenants and agrees to use said rented premises only for a grocery store." There is one bedroom and a kitchen in the back which tenant lives in. The term has expired and the owner seeks by this proceeding to regain possession of the store and basement. The tenant has a wife and lives in the back, having a bed in the kitchen and using the bedroom for storage.

The tenant's counsel stated as follows: "The man is a grocer, he lives in the rear and there is no entrance to the room except through the store."

The court: "If that is the case I will find it is a dwelling and comes under the same category as a dwelling-house. Where there is any person living in any part of the premises it is considered a dwelling apartment."

The court has entirely disregarded the express terms of the lease, and has simply by interpretation converted a lease for business purposes into a lease for dwelling purposes. The question of whether the tenant may retain the portion of the leased premises occupied by him as a dwelling is not now before us, but certainly the landlord is entitled to regain possession of the store and basement.

The affirmance of this judgment would establish the principle that a person leasing business property for business purposes, by simply using a small portion thereof for dwelling purposes, may retain possession of the entire property during the life of the statute

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irrespective of the terms of his lease and in disregard of the rights of the owner.

The final order should be reversed, with ten dollars costs, and final order directed awarding the landlord possession of the premises.

LEHMAN and DELEHANTY, JJ., concur.

Order reversed.

NATHAN KRONMAN & COMPANY, Plaintiff, v. THE TEXAS TRANSPORT AND TERMINAL COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Ships and shipping — contracts — carriers — wharfage — agreement by consignee to pay pro rata charge for heated pier enforced.

Plaintiff was the consignee of more than 6,000 cases of onions which were expected to arrive in New York on or about February 24, 1920, on a steamship operated by defendant. In anticipation of the arrival of the vessel, plaintiff, with other consignees of similar goods, being desirous that the cargo should be unloaded at a heated wharf, where there would be no danger of the cold weather injuring the onions, signed a writing addressed to defendant by which, in consideration of its engaging a certain heated pier for the discharge of the cargo of onions, the consignees agreed, in the event that the vessel did not dock on or before February 24, 1920, to pay the defendant the sum of $330 per day as the cost of said pier up to the date of her docking, upon condition that whenever the vessel docked the charges to the consignee for wharfage should commence forty-eight hours after the termination of the discharge of the cargo. The ship did not arrive until three days after said February twenty-fourth and after the cargo had been discharged defendant sent to plaintiff a check for $442.36 with a statement showing that plaintiff had been charged for wharfage and other expenses the difference between the amount of said check and the amount of plaintiff's "wharfage deposit" which it had made under protest. The plaintiff refused to

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accept the check and brought this action to recover the full amount of the deposit. *Held*, that though defendant was not bound to provide a heated wharf, it had a right to contract to furnish such a one for additional compensation and that plaintiff having acted upon the agreement was bound by its terms.

A contention that the agreement was unenforcible as against public policy on the ground that defendant in any event was bound to furnish a proper place for the landing of the cargo and had no right to demand extra payments to enable it to comply with its own obligation, was untenable.

Plaintiff's obligation, under the contract, being limited to its *pro rata* share of $330 per day from February twenty-fourth to the date of the arrival of the vessel, the judgment in favor of plaintiff for the full amount of the wharfage deposit was erroneous, and will be reversed unless plaintiff stipulates to reduce the judgment by its *pro rata* share of $990, in which event the judgment as modified will be affirmed, without costs to either party.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, entered in favor of the plaintiff, after a trial before the court without a jury.

William Hayward, United States Attorney (Francis A. McGurk, Assistant United States Attorney, of counsel), for appellant.

Joffe & Joffe (Joseph Joffe, of counsel), for respondent.

LEHMAN, J. The defendant corporation operated in February, 1920, a steamship for the United States Shipping Board Emergency Fleet Corporation. The plaintiff was the consignee of more than 6,000 cases of onions which were expected to arrive in New York on or about February twenty-fourth on that vessel. In anticipation of its arrival the plaintiff together with a number of other consignees of similar goods

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signed a written agreement addressed to this defendant which reads as follows:

"We, the undersigned, consignees of onions ex S. S. Lake Frio (in consideration of your engaging the heated pier 22, Brooklyn, for the discharge of its cargo of onions on receipt of this agreement) agree in the event that S. S. Lake Frio does not dock on or before February 24, 1920 as follows:

"We will pay you at the rate of $330 per day, beginning Tuesday, February 24, 1920, as the cost of said pier up to the date of her docking, upon this further condition and provision; namely, that when the said vessel docks, whether before or on or after February 24, 1920, the usual wharfage terms will prevail from the date of her docking; that is the charges to consignees for wharfage shall commence forty-eight (48) hours after the termination of the discharge.

"Should there be a charge to us under this agreement you are to pro rate the charge to us according to the quantity and size of the packages we severally have on this vessel."

The steamship arrived in New York on February twenty-seventh and on February twenty-eighth an officer of the plaintiff claims that he had a conversation over the telephone with some person who he believes was a Mr. Cohalane, the assistant of defendant's treasurer. At that time he told Mr. Cohalane "that the wharfage deposit that they demanded was entirely unreasonable and they told us *that the wharfage would only accrue forty-eight hours* after the complete discharge of the vessel and they would return whatever was coming to us." Thereafter the plaintiff sent the defendant a "wharfage deposit" of $780.99 stating in the letter in which the deposit was enclosed that it was made "under protest." After the cargo of the vessel was discharged the

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defendant sent to the plaintiff a check for the sum of $442.36 with a statement showing that the plaintiff had been charged for wharfage and other expenses the difference between the amount of that check and the amount of plaintiff's deposit. The plaintiff refused to accept the check and brought this action to recover the full amount of the deposit.

It is not disputed that the plaintiff did remove from the wharf within forty-eight hours after the discharge of the vessel's cargo, all the cases consigned to it except possibly a few which were destroyed by the health department and the plaintiff claims that the defendant is bound by the agreement alleged to have been made through Mr. Cohalane and must, therefore, return the entire amount of the deposit made by it in advance for wharfage while the defendant claims that the plaintiff is bound by its own written agreement to pay for a heated wharf.

The defendant urges on this appeal that the evidence in regard to the telephone conversation was incompetent because the plaintiff did not recognize the voice of the man with whom the conversation was held; that even if the conversation was held with Cohalane, there is no evidence that he had authority to modify or abrogate the plaintiff's written agreement to pay his *pro rata* share for a heated wharf from February twenty-fourth to the arrival of the steamship and finally, that even if Cohalane had such authority, the conversation is insufficient to show an actual modification. It seems to me unnecessary upon this appeal to determine whether the identification of Mr. Cohalane was sufficient to permit evidence of the telephone conversation, for in my opinion there is no evidence to show either that Mr. Cohalane had authority to modify the written contract or that he intended to do so. If the written con-

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tract was valid and enforcible, then the conversation with Mr. Cohalane amounted to nothing more than a statement that the amount demanded as a deposit for wharfage was tentative, that no wharfage would accrue from the date of the arrival of the vessel until forty-eight hours after the discharge of the cargo and if the cases consigned to the plaintiff were removed within forty-eight hours after the discharge of the cargo, then the defendant would not retain the whole deposit. On the other hand, if the written contract is not valid then even if no conversation had ever been held as claimed by the plaintiff, the plaintiff would still be entitled to the return of the deposit, for the written instrument itself shows that in the absence of special contract, no wharfage can by custom be charged against the consignee who removes his goods within forty-eight hours after the cargo has been discharged.

The real question to be determined in this case is therefore whether the written contract is enforcible. It appears that at the time when this instrument was signed, the consignees of the onions on board the steamship were desirous that the cargo should be unloaded on a heated wharf where there would be no danger of the cold weather injuring the onions. There are only a few available wharfs in New York which can be heated and the defendant was not willing to rent a wharf in advance of the arrival of the steamship and there was a possibility that no wharf which could be heated would be available when the steamship arrived. For that reason the consignees entered into an agreement to pay the sum of $330 per day from February twenty-fourth till the date of the actual arrival of the steamship. In spite of the fact that the plaintiff acted upon the agreement the plaintiff now claims that the agreement was against public policy

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and, therefore, unenforcible because a carrier is in any event bound to furnish a proper place for the landing of the cargo and has no right to demand from consignees extra payments to enable it to comply with its own obligation. The plaintiff's contention does not seem to me in accordance with either reason or authority. It is true that a carrier is under an obligation to use due care both in transporting and landing its cargo and it cannot by any contract absolve itself from this obligation. The contract between the parties does not, however, provide that the defendant shall not be liable for failure to use due care in carrying out its contract of carriage. It may be that if the cargo had arrived during cold weather it would have been negligence on the defendant's part to unload the onions on an unheated wharf without due notice to the consignees to remove the onions as they left the ship and possibly it might have been required to take precautions for the protection of goods that might be injured by cold but it was not bound to provide a heated wharf and if the consignees desired that such a wharf should be procured, the defendant had a right to enter into a contract with them to furnish such a wharf for additional compensation. The plaintiff is, therefore, bound by the terms of the agreement and since it appears that the ship did not arrive till three days after February twenty-fourth, the judgment in favor of the plaintiff for the full amount of the deposit is erroneous.

It does not follow, however, that the defendant was entitled to retain the amount deposited by the plaintiff with the exception of $442.36 which was tendered by the defendant, for the amount so retained includes not only the plaintiff's *pro rata* share of the agreed sum of $330 per day but also its *pro rata* share of a larger amount claimed to have been expended for

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heating the wharf and also expenses in sorting and transporting onions which it is claimed belonged to the plaintiff and which were destroyed by the board of health.

The evidence presented by the defendant to establish the last item was clearly insufficient. The only obligation on the part of the plaintiff which the defendant sufficiently proved was the obligation under the written contract and that is expressly limited to the plaintiff's *pro rata* share of $330 per day from February twenty-fourth to February twenty-seventh, the date of the arrival of the vessel.

Judgment should, therefore, be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event unless the plaintiff stipulates within ten days after entry of order herein to reduce the judgment by its *pro rata* share of $990, and if such stipulation is filed, the judgment as modified should be affirmed, without costs to either party.

WHITAKER and DELEHANTY, JJ., concur.

Judgment reversed.

IRA THOMAS McKNIGHT, Respondent, *v.* J. FRANK McGUIRE, Appellant.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Brokers — commissions — lessee held liable for services in procuring lease when commission cannot be secured from the owner.

The mere fact that a broker was employed by the owner of real estate to procure a lessee therefor does not preclude the broker from being also employed by another to submit to the owner an offer to rent the premises.

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Defendant at the time he stated to plaintiff, a real estate broker, "If you can get that house for two years for $250 a month I will take it," was aware that the plaintiff would obtain a commission from the owner of the premises. In consequence of defendant's failure to make a certain payment to be made on delivery of the lease, it did not become effective and plaintiff failed to earn any commission from the owner of the premises. *Held*, that defendant's statement was an employment of plaintiff to act as defendant's agent in the matter, and that defendant was liable in damages for breach of his agreement with the plaintiff, and the judgment in favor of plaintiff will be affirmed.

Appeal by defendant from a judgment of the Municipal Court, borough of Manhattan, ninth district, entered in favor of the plaintiff.

Walter R. Kuhn, for appellant.

Allen P. Hallett (Thomas Berry, of counsel), for respondent.

Lehman, J. The plaintiff, a real estate broker, had numerous conversations with the defendant in reference to procuring for him the lease of some suitable dwelling. He showed him a number of residences which were not satisfactory. On September twenty-ninth he took the defendant in his car and showed him the residence of a Mr. Rigby for which the owner was asking $300 per month. The defendant then stated to the plaintiff: "If you can get that house for two years for $250 a month I will take it." The plaintiff thereupon telephoned this offer to the owner of the house who accepted it. The parties thereupon met and agreed upon all the terms of a lease. The lease contained a clause that the lessee should pay $500 on the delivery of the lease and though the defendant signed the lease and promised to pay $500 promptly and accept delivery of the lease, he has failed to do

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so. Since the lease was not to be delivered and become an effective contract until the $500 was paid, the plaintiff failed to earn any commission from the owner of the premises and has now brought this action against the defendant.

It seems clear that if the defendant employed the plaintiff to submit an offer to the owner of the premises and agreed with the plaintiff that if plaintiff procured a lease for him upon acceptable terms he would rent the premises and if at that time he was aware of the fact that the plaintiff would thereby obtain a commission from the owner of the premises, he is liable in damages for the breach of his agreement with the plaintiff. *James* v. *Home of the Sons & Daughters of Israel,* 153 N. Y. Supp. 169, cited in *Parker* v. *Simon,* 231 N. Y. 503. The mere fact that the plaintiff was employed by the owner to procure a lessee for the premises does not prevent the plaintiff from being also employed by this defendant to submit to the owner an offer for the premises. In fact there can be no question in this case that the plaintiff was authorized by this defendant to submit to the owner an offer for the premises. In fact there can be no question in this case that the plaintiff was authorized by this defendant to make an offer in his behalf. The case is not one where a broker merely brings to a possible purchaser or lessee an offer to sell or lease on behalf of the owner to be accepted or refused by the proposed customer for in this case the broker was endeavoring to find property for sale or lease which would be satisfactory to this defendant and he was authorized to carry the offer of the defendant to the owner. The defendant undoubtedly knew that the plaintiff was performing these services in the hope of profit and he also undoubtedly knew that ordinarily the broker looks to the owner for his com-

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missions and that, therefore, the plaintiff would become entitled to the commissions from the owner if the defendant's offer to lease was accepted. The defendant stated to the plaintiff "if you can get that house for two years for $250 a month I will take it," and under all the circumstances of the case this statement constituted not merely an offer to the owner but an employment of the plaintiff to act as his agent in carrying an offer to the owner and an express agreement with the defendant that if the offer is accepted, the defendant will enter into a contract for the property. In my opinion the case can in no wise be distinguished from *James* v. *Home of the Sons & Daughters of Israel, supra,* and the Court of Appeals in the case of *Parker* v. *Simon, supra,* seems to approve the reasoning of that case.

Judgment should, therefore, be affirmed, with twenty-five dollars costs.

WHITAKER and DELEHANTY, JJ., concur.

Judgment affirmed.

MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK, Appellant, *v.* GUISEPPE TERMINI, Respondent.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Bills and notes — a bank receiving check for deposit is not merely the agent of the indorser but a trustee of an express trust and can bring action in its own name — Negotiable Instruments Law — Civil Practice Act, § 210.

A check indorsed and delivered by the payee was received by plaintiff, a bank, for deposit, the deposit slip containing a clause "checks credited subject to payment," and, on present-

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ment of the check for collection, payment was refused. In an action on the check against the maker, *held*, that the mere crediting of the check by plaintiff to the depositor's account on its books did not constitute it a "holder in due course" as that term is defined in the Negotiable Instruments Law so as to render its title superior to defenses which the drawer might have against the payee, it appearing that the depositor's account continued to be sufficient to pay the check in the event of its dishonor.

The defendant made no attempt to prove any defenses, as he might have done, but the complaint was dismissed on the ground that plaintiff was merely the custodian of the check solely for the purposes of collection and was not entitled to bring the action in its own name. *Held*, that since the Negotiable Instruments Law expressly gives the holder of a negotiable instrument under an indorsement which constitutes him the agent of the indorser, the right to bring any action on the instrument that the indorser can bring, the plaintiff was not merely the agent of the indorser but was the trustee of an express trust under section 210 of the Civil Practice Act (Code Civ. Pro. § 449) and entitled to bring the action in its own name, and the judgment entered on the dismissal of the complaint will be reversed and a new trial ordered.

APPEAL by the plaintiff from a judgment entered in the City Court of the city of New York dismissing the complaint at the close of the plaintiff's case, and from an order denying a motion for a new trial.

Frank M. Patterson (Franklin H. Mills, of counsel), for appellant.

Philip J. Termini (O'Gorman, Battle & Vandiver, Isaac H. Levy, of counsel), for respondent.

LEHMAN, J. The plaintiff has brought an action upon a check made to the order of A. Bolognesi & Co. and indorsed and delivered by them to the plaintiff bank. It appeared at the trial that the check was received by the plaintiff from Bolognesi for deposit

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and that the deposit slip contained a clause "Checks credited subject to payment." When the check was presented by plaintiff for collection, payment was refused. Under these circumstances it would appear that the mere crediting of the check by the plaintiff to the depositor's account on the books of the bank for the amount of the check in suit did not constitute the bank a holder of the check in due course within the law merchant as that term is now defined in the Negotiable Instruments Law so as to render its title superior to the defenses which the drawer of the check may have against the payee, for it appears that the depositor's account continued to be sufficient to pay the check in the event of its dishonor. *Citizens' State Bank* v. *Cowles,* 180 N. Y. 346. In the present case, however, the defendant did not attempt to prove any defenses which he may have but the complaint was dismissed on the defendant's motion on the ground that the bank "was merely the custodian of the check for the sole and only purpose to collect the same," and was not entitled to bring an action upon the check in its own name.

Although the plaintiff may not be a holder for value, it is the indorsee of the check in possession of it, and under section 2 of the Negotiable Instruments Law the word "holder" as used in the act, unless the context otherwise requires, means the "indorsee of a bill or note, who is in possession of it, * * *." Under section 90 of the same statute it is provided that "the holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." It seems to me quite clear that under the express provisions of the statute the plaintiff, being the holder of the instrument, is entitled to sue thereon in its own name. If there were any doubt in regard to the intent of the statute it seems to me

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that it would be completely removed by the fact that even if the indorsement itself had been restrictive in form and merely constituted the bank the agent of the indorser, the bank would still under section 67 of the Negotiable Instruments Law have had the right to bring any action thereon that the indorser can bring.

In spite of the language of the Negotiable Instruments Law, the defendant, however, contends that under section 449 of the Code of Civil Procedure (now section 210 of the Civil Practice Act) the plaintiff cannot sue in its own name for it is not the trustee of any express trust. I have carefully examined all the authorities cited in the careful opinion of the justice below and by the respondent upon this appeal. In no former case that I have been able to find have the courts of this state been called upon to decide directly the question now raised before us, but, though I believe the reasoning of most of the cases where analogous questions have been considered tends to support the view that the plaintiff has a right to bring this action in its own name, there are other cases which contain expressions which point rather to the view that the indorsee of a bill or note who holds it only for collection is not the trustee of an express trust, and, therefore, cannot maintain an action. In none of these cases, however, has the court considered the effect of the sections of the Negotiable Instruments Law quoted above. It would appear that since the Negotiable Instruments Law expressly gives the holder of a negotiable instrument under an indorsement which constitutes him the agent of the indorser the right to bring any action on the instrument that the indorser can bring, the holder by the express terms of the statute is not merely the agent of the indorser but is the trustee of an express trust. As Professor Ames has stated in 14 Harvard Law Review, page

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241: "Since the so-called 'agent of the indorser' has, under section 37 [section 67 in the New York statute] the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent."

It follows that the judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

WHITAKER and DELEHANTY, JJ., concur.

Judgment reversed.

NATIONAL DOLL OUTFIT & INFANTS' WEAR CO., INC., Respondent, v. SIGMUND HERBERT, Appellant.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Corporations — directors — when not individually liable for debt of corporation — Stock Corporation Law, § 20, as amended by Laws of 1920, chap. 606, restricted to corporations with stock of no par value.

Section 20 of the Stock Corporation Law making directors jointly and individually liable for a violation of its provisions, as amended by chapter 606 of the Laws of 1920, applies only to corporations which have no fixed or par value to the shares of stock issued by them.

Where a judgment is obtained against a stock corporation for goods sold and the judgment creditor brings an action against one of the directors of the judgment debtor, who was also its treasurer, upon the ground that the corporation had begun business without having paid in its capital stock, section 20 of the Stock Corporation Law, as amended, has no application to the facts, and the action having been tried solely for the violation of the statute, the judgment rendered in favor of plaintiff will be reversed and a new trial ordered.

APPEAL by defendant from a judgment in favor of plaintiff after a trial before the court without a jury,

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entered in the Municipal Court of the city of New York, borough of Manhattan, second district.

Grossfield Bros. (Louis I. Grossfield, of counsel), for appellant.

Eugene I. Yuells, for respondent.

WHITAKER, J. Action brought by a judgment-creditor of a domestic corporation against one of its directors to recover a debt due from the corporation.

The National Doll Outfit & Infants' Wear Co., Inc., sold to the International Doll Corporation merchandise.

The defendant was a director and treasurer of the International Doll Corporation. Plaintiff sued the Doll Corporation, procured judgment, issued execution thereon which was returned unsatisfied.

Plaintiff thereupon sued the defendant Herbert, claiming that under the corporation laws the defendant was liable for the debt upon the ground that the Doll Corporation had begun business without having paid in the capital stock.

Plaintiff bases his action on section 34 of the General Corporation Law, section 3 of the Business Corporations Law, and sections 19 and 20 of the Stock Corporation Law. Section 34 of the General Corporation Law provides the methods of incorporation, and that the corporation shall be governed by a board of directors. Section 3 of the Business Corporations Law provides: "No such corporation shall incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, shall have been paid in in money or property."

When the evidence establishes that the Doll Corporation violated these provisions of the statute, and

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presumably with the knowledge of defendant, there is nothing in the provisions of the statutes above referred to which makes the defendant individually liable. Section 19 of the Stock Corporation Law provides that the certificates of incorporation of certain corporations may provide for the issuance of the shares of common stock of such corporations without any normal or par value by making certain statements, etc.

Section 20, under the provisions of which the plaintiff claims the judgment should be sustained, had in our opinion no application to the facts alleged in the complaint and proved upon the trial. This section originally provided, as is correctly quoted by the defendant, that "No corporation formed pursuant to section nineteen hereof shall begin to carry on business or shall incur any debts until the amount of capital stated in its certificate of incorporation shall have been fully paid in money or in property taken at its actual value."

Then follows the provision which makes the directors jointly and individually liable for violation. In 1920, by chapter 606, this section was amended in such a way as to clearly demonstrate that it only has application to corporations which have no fixed or par value to the shares of stock issued by them. This amendment provides: "No corporation *authorized to issue shares without nominal or par value shall,* * * *," etc.

The plaintiff in his brief seeks to sustain the judgment upon the ground of fraud. Even if there was sufficient evidence to sustain fraud, I think the pleadings disclose that the action was based upon the violation of the statute, and that the court and counsel tried the case solely upon the theory, and that a jury having been impanelled the defendant waived a

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jury trial because it was understood by court and counsel that the cause would be tried solely for violation of the statute and not for fraud.

The judgment is reversed and a new trial ordered, with thirty dollars costs to appellants to abide the event.

LEHMAN and DELEHANTY, JJ., concur.

Judgment reversed.

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176 WEST 87TH ST. CORPORATION, Respondent, *v.* FREDERICK FLEISCHMAN, Appellant.

(Supreme Court, Appellate Term, First Department, November Term — Filed December, 1921.)

Landlord and tenant — unjust rent — contracts — acceptance — lease held to take effect upon delivery to tenant by mail — rent laws apply.

Upon the trial of an action for rent, pleaded by the tenant to be unjust and unreasonable, it was undisputed that in March, 1920, the landlord, a corporation, informed defendant that if he desired to remain on the premises after October 1, 1920, when his lease would expire, he must immediately enter into a lease for a new term. *Held*, that a lease for a term beginning October first and signed by the tenant at the office of the landlord's agents on the thirtieth of March, was in effect merely an offer on the part of the tenant which became effective as a contract only when accepted.

An officer of the landlord signed the lease on March thirty-first and the letter in which it was mailed to defendant was delivered at his residence on April first and was received by him on his return from business at six-thirty of that evening. *Held*, that the lease took effect April 1, 1920, and the tenant being entitled to the protection of the rent laws enacted on that day, a denial of his motion to dismiss the complaint because of the landlord's failure to file a bill of particulars, was error for which the judgment entered in favor of plaintiff will be reversed and the complaint dismissed.

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APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, entered in favor of the plaintiff.

Samuel Fleischman, for appellant.

Henry S. Mansfield, for respondent.

LEHMAN, J. The landlord brought an action to recover the agreed rental of premises hired by the defendant under a written lease which purports to be dated the 22d day of March, 1920. The defendant pleaded that the rent is unjust and unreasonable and that the alleged lease is oppressive. The trial justice, however, held that the lease was executed before April 1, 1920, and that the rent laws enacted on that day could, therefore, furnish the defendant with no protection. The undisputed evidence shows that in March, 1920, the landlord informed the defendant that if he desired to remain in the premises after the expiration of his lease on October 1, 1920, he would be required immediately to enter into a written lease for a new term. On March thirtieth after considerable discussion, the defendant went to the office of the landlord's brokers and agents and there signed a proposed lease for a term beginning October first. At that time the landlord had not signed the proposed lease and was, therefore, not bound by its terms. On March thirty-first an officer of the landlord signed the lease and it was sent by mail to the defendant. The letter was delivered at the defendant's residence on April first and received by him on his return from business at six-thirty of that evening. The appeal presents a single question of law, viz., at what time did the lease become effective? Both sides concede

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in effect that when the lease was signed by the defendant it was not binding on the landlord and constituted in effect merely an offer on his part which became effective as a contract only when the offer was accepted. The offer was not as a matter of law accepted until the landlord signed the contract and delivered it to the defendant or the defendant's agent. If the landlord was authorized by the defendant expressly or impliedly to return the contract to the defendant by mail then the post office department became the agent of the defendant to receive the acceptance and the contract was completed on March thirty-first when the letter was mailed. *Watson* v. *Russell,* 149 N. Y. 388; *Howard* v. *Daly,* 61 id. 362. On the other hand if the landlord chose of his own volition and without the authority from the defendant to notify the defendant of its acceptance of his offer by mail, then the post office department was the agent of the landlord and the contract did not become effective until the letter was delivered. *Crown P. I. Co.* v. *Ætna Insurance Co.,* 127 N. Y. 608. In the present case there is absolutely no evidence which would justify a finding that the defendant had authorized the landlord to return the contract to him by mail. The defendant went in person to the office of the broker and there signed the contract. The offer of the defendant was, therefore, not made by mail. The agent's place of business is in the same city and borough as the defendant's residence and this residence was in a part of the building of the landlord. Under these circumstances it cannot be said that it was within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance.

It follows that the lease took effect only on the 1st

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day of April, 1920, and the defendant, therefore, had a right to plead that the rent was unjust, unreasonable and oppressive and to move for the dismissal of the complaint because of the failure of the landlord to file a bill of particulars.

Judgment should, therefore, be reversed, with thirty dollars costs and the complaint dismissed, with costs.

WHITAKER and DELEHANTY, JJ., concur.

Judgment reversed.

CLARRY LUMBER COMPANY, INC., Respondent, v. JAMES J. O'BRIEN, Appellant.

(Supreme Court, Appellate Term, Second Department, December, 1921.)

Principal and agent — undisclosed principal — election — res adjudicata — mere commencement of action against principal held not to discharge agent, but amount paid by principal must be credited.

While the commencement of an action against a disclosed principal on a contract made with its agent is some evidence of an election to hold the principal only, it is not conclusive to exonerate the agent.

The trial of an action for lumber sold and delivered, in which the main contention was as to whether in the transaction defendant acted only as agent for a building corporation, resulted in a judgment against defendant. Subsequently the plaintiff brought an action upon the same cause of action against the corporation but upon payment of a certain sum said action was settled and discontinued, and the plaintiff executed a general release of all claims against the corporation. After defendant's motion for a new trial, on the ground of newly discovered evidence, had been granted, he was permitted to amend his answer so as to plead, as separate defenses, payment, accord and satisfaction and *res adjudicata*. Upon the new trial it

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appeared that not until after the first trial did plaintiff know that the corporation was the principal, and the court found as a fact that at the time of the purchase of the lumber defendant was not acting as agent. *Held*, on appeal from the judgment rendered in favor of plaintiff for the full amount claimed, that the judgment should be modified by reducing the same in the sum received by plaintiff upon the settlement of his action against the corporation, and as so modified, affirmed.

APPEAL from a judgment in favor of the plaintiff, after a trial in the Municipal Court of the city of New York, borough of Queens, first district. The action was for goods sold and delivered, consisting of lumber to the agreed value of $211.87.

Judson D. Campbell, for appellant.

Israel Siegel, for respondent.

KELBY, J. This appears to have been the second trial of the action between the parties, and the first trial also resulted in a judgment against the defendant. The main contention on this appeal and on the former trial is that the defendant acted as agent only for a corporation known as the Academy-Astoria Corporation. It appears to be conceded that this corporation was erecting some houses in the borough of Queens, and that O'Brien, the defendant, was their superintendent of construction. After the first trial the defendant and the plaintiff's attorney, it appears, had a conversation concerning the defendant's alleged agency for the Academy-Astoria Corporation, part of the conversation being, as alleged by the defendant, that the plaintiff's attorney agreed that he would sue the Academy-Astoria Corporation as principal, and if he collected the judgment that the existing judgment against the defendant O'Brien would be satisfied of record. Subsequently, the plain-

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tiff did commence an action against the Academy-Astoria Corporation, but did not prosecute it to judgment, but on payment of the sum of $115 by the Academy-Astoria Corporation to the plaintiff the action was settled and discontinued, and the plaintiff gave a general release of all claims against the Academy-Astoria Corporation. The settlement of this action against the Academy-Astoria Corporation was subsequent in time to the entry of judgment against the defendant O'Brien. After this settlement the defendant moved for a new trial on the ground of newly discovered evidence. This motion was opposed, but the motion was granted, and at the commencement of this trial, which is now under review, the defendant was permitted to amend his answer so as to plead as separate defenses "payment, accord and satisfaction, and *res adjudicata.*"

It is not disputed that the defendant originally bought lumber of the value of $343.87 from the plaintiff, and that a credit of $132 has been allowed thereon for return of some of the lumber. The plaintiff's president, Mr. Clarry, testified that the defendant at the time of ordering the lumber did not mention that he was the agent for any corporation, and that plaintiff never heard of any corporation until four months later; that would be in December, 1919. At that time, the witness said, the defendant O'Brien told him that he (O'Brien) was suing the Academy-Astoria Corporation, and that he had a lien and suggested "that the plaintiff go in on the property also." The witness told O'Brien that he could not do so because the time within which to file a lien had expired. Presumably both parties were speaking of a materialman's lien for furnishing material on a job owned by the corporation. The witness continued: "O'Brien suggested that I write to Mr. Jones (attorney for the

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Academy-Astoria Corporation), and he gave me his name and address, and said that probably Jones would settle the case."

Mr. Jones, the attorney for the corporation, testified that when the corporation was sued he authorized the settlement of the action to save the time and trouble to go to court, notwithstanding the fact that he believed the corporation had a defense against the claim; the defense being that while O'Brien was acting as an agent for them he exceeded his authority in buying the lumber; that he had no authority to buy any materials, and that the defendant's sole duties were to superintend the construction.

The trial court found that the defendant was not acting as agent at the time of the purchase of the lumber from the plaintiff.

The authorities are quite confusing as to the rights of a third person to sue both the agent and the principal when the third person learns who the principal is. It is the contention of the defendant that when the plaintiff sued the Academy-Astoria Corporation and subsequently settled the action that was an election to hold the principal, and that this election operated to discharge the defendant from any claim concerning the lumber. The respondent contends that the mere commencement of a suit, not followed by the entry of judgment against the principal and satisfaction of the claim, does not operate as a discharge or satisfaction of the claim against the agent.

In the case of *Georgi* v. *Texas Company*, 225 N. Y. 410, it was held that "The question of election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice." In that particular case the plaintiff came into full and complete knowledge of all of the facts in the case and brought suit against the agent. The plaintiff

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even had the original order of the undisclosed principal in writing authorizing the agent in that case to make purchases on behalf of the Texas Company, the undisclosed principal. In spite of this full knowledge the plaintiff prosecuted the claim against the agent to judgment and subsequently, when the agent became insolvent, filed a claim in bankruptcy against the insolvent agent. This prosecuting to judgment and filing of claim was held to be conclusive of a voluntary election by the plaintiff to hold the agent alone. In that case, however, the knowledge of the plaintiff was complete. It does not follow, however, that a plaintiff is required to make an election at his peril where he has no conclusive knowledge of all the facts, nor is he in my opinion compelled to determine an issue of fact as to the truthfulness of information concerning the agency at his own peril.

In the case of *Cherrington* v. *Burchell,* 147 App. Div. 16, it was held that the plaintiff could not sue the agent and a disclosed principal and recover judgment against both, but he must elect to hold one or the other, and the case of *Tuthill* v. *Wilson,* 90 N. Y. 423, 428, was cited as authority. In the latter case the Court of Appeals said: "The vendor could not enforce his claim against both the principal when discovered and the agents who contracted in his behalf. Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of the agents, and yet not their contract but that of the principal. The vendor had a choice and was put to his election. (*Meeker* v. *Claghorn,* 44 N. Y. 351, and citing other cases). The rule is well stated in Leake's Digest, 503–4, that 'if, after discovery of the principal, the creditor elect to hold the agent liable, and act accordingly in a manner to affect the principal, he

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would be precluded from afterward charging the principal. He has the right of election as to which of them he will hold responsible, but having once made an election is bound by it.' "

On the other hand it has been held by some courts that changing the form of the agent's obligation by putting it into a condition in which it can be readily enforced, like a judgment, is not inconsistent with an intention to proceed against the principal also. That nothing short of satisfaction of the judgment against the agent would then release the principal as a matter of law. See Meacham Agency, § 1759; citing *Beymer* v. *Bonsall*, 79 Penn. 298. This was said to have been the rule in the case of *McLean* v. *Sexton*, 44 App. Div. 520; *Tew* v. *Wolfsohn*, 77 id. 454. The ruling in these last two cases is largely on the approval of the principle in *Beymer* v. *Bonsall, supra*, and is to be found in *Cobb* v. *Knapp*, 71 N. Y. 348, and *First National Bank* v. *Wallis*, 84 Hun, 376. These two latter cases are not directly in point, but approve of the case of *Beymer* v. *Bonsall, supra*. The case of *Beymer* v. *Bonsall* is disapproved in *Barrell* v. *Newby*, 62 C. C. A. 382; 127 Fed. Repr. 656.

The outstanding fact in this case is that the plaintiff has consistently sought to hold the agent, and that it has prosecuted its claim to judgment twice. It has never prosecuted its claim against the Academy-Astoria Corporation to judgment. And it further appears that the plaintiff did not know the identity of the principal until after the first trial of the action. No case has been pointed out to this court where it has been held as a matter of law that the mere commencement of an action against a disclosed principal is an election to hold the principal only and exonerates the agent. It may be some evidence of the fact of election, but it is not at all conclusive. The com-

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promise of the plaintiff with the Academy-Astoria Corporation does not operate, as a matter of law, to release the agent. In good conscience, however, the plaintiff cannot be allowed to get a judgment for the full amount against this defendant, but must credit the defendant with the $115 already admittedly received from the Academy-Astoria Corporation on the same sale of lumber.

The judgment appealed from is, therefore, modified by reducing the recovery from the sum of $211.87 to $96.87, and, as thus modified, affirmed, with appropriate costs in the court below and without costs of this appeal.

CROPSEY and LAZANSKY, JJ., concur.

Judgment modified, and as modified, affirmed.

ESTHER M. KORNBLUM, Appellant, v. AMELIA SCHELL, Respondent.

(Supreme Court, Appellate Term, Second Department, September Term — Filed December, 1921.)

Landlord and tenant — reasonable rent not an issue unless pleaded by tenant — question of fact — presumption referred to in chapter 944, Laws of 1920, available in summary proceedings — rent greater than preceding year presents prima facie unreasonableness — burden of proof — Civ. Pr. Act, § 1425.

In an action for rent based upon an agreement or in a summary proceeding the landlord need not establish that the rent sued for is reasonable; that is not an issue unless made so by the tenant's pleading, in which event a defense that the rent is unreasonable becomes, under the recent rent legislation, a question of fact.

Under the general provision of section 1425 of the Civil Practice Act, to the effect that a defense or counterclaim may

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be set up and established in a summary proceeding "in like manner as though the claim for rent in such proceeding was the subject of an action," the presumption referred to in chapter 944 of the Laws of 1920, that if in an action for rent it appears that the rent sued for is greater than it was one year prior to the making of the agreement under which it is sought to be recovered, the agreement "shall be presumptively unjust, unreasonable and oppressive," is available in a summary proceeding, because it is one of the ways in which the tenant may establish his defense.

While in an action for rent the defendant must plead his defense that the rent claimed is unreasonable, he makes out a *prima facie* case of unreasonableness when the evidence shows that the rent sued for is greater than it was a year before the agreement sued on was made.

In the absence of other proof the presumption referred to in chapter 944 of the Laws of 1920 will support the defense of unreasonable rent; if, however, there is other proof tending to show that the rent sued for is reasonable, an issue of fact is created for the jury which must be instructed that the burden of proving that the rent is unreasonable is upon the defendant.

Where the proof brings into operation the statutory presumption, the landlord, if he would overcome the effect thereof, must offer proof to show that the rent sued for is reasonable.

It *seems*, that in an action for use and occupation the burden of proof as to what is a reasonable charge for rental is upon the landlord and this rule has not been changed by the recent rent legislation.

REARGUMENT of appeal by landlord from a final order of the Municipal Court of the city of New York, borough of Brooklyn, sixth district, in favor of the tenant entered upon the verdict of a jury.

McLeer & Dobson, for appellant.

William C. Casey, Jr., for respondent.

CROPSEY, J. The question that it is sought to have determined upon this reargument relates to the burden of proof in actions and proceedings brought under

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the recent rent legislation. There seems to be confusion as to this, which may arise out of the provisions of the recent statutes creating a presumption. In chapter 944 of the Laws of 1920, which relates to an action to recover rent, and which provides that in such an action the tenant may plead that the rent is unreasonable, it is further provided that if it appears that the rent sued for is greater than it was one year prior to the time the agreement was made under which the rent was sought to be recovered, the agreement "shall be presumptively unjust, unreasonable and oppressive." The first question is whether that presumption applies equally in a summary proceeding to recover possession of property. There is no express provision in any of the recent legislation making such a defense applicable in such a proceeding, but there is the general provision of section 2244 of the Civil Code, now section 1425 of the Civil Practice Act, to the effect that a defense or counterclaim may be set up and established in a summary proceeding "in like manner as though the claim for rent in such proceeding was the subject of an action." Under this provision the presumption referred to becomes available in a summary proceeding because it is one of the ways in which the tenant may establish his defense. *Lewine* v. *Weil,* 188 N. Y. Supp. 385.

In an action for rent based upon an agreement or in a summary proceeding the landlord need not establish that the rent sued for or unpaid is reasonable. The reasonableness of the rent is not an issue unless it is made so by the tenant's pleading. If the tenant pleads as a defense that the rent is unreasonable then that becomes a question of fact under the recent legislation. And as the tenant asserts the defense of unreasonableness he must prove it. By virtue of the provision creating the presumption already mentioned the ten-

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ant does make out a *prima facie* case of unreasonableness when the evidence shows that the rent sued for or unpaid is greater than it was a year before the agreement sued upon was made. And if there be no other proof in the case, this presumption will support the tenant's defense. If, however, there be other proof in the case tending to show that the rent is reasonable, then an issue is created which must be decided by the trier of the facts. But in such case if the trial be before a jury they must be instructed that the burden of proving that the rent is unreasonable is upon the tenant. Where the proof brings into operation the presumption, the landlord, if he would overcome the effect of it, must offer proof to show that the rent is reasonable. And this is all we think was intended by the expressions in *Maitland* v. *Kerrigan*, 187 N. Y. Supp. 495, and *Klamer Realty Corp.* v. *Brill*, 189 id. 92. But this is not the same as saying the burden of proving the reasonableness of the rent is upon the landlord. That burden is upon the tenant at all times.

The rule, however, would be different if no agreement had been made fixing the amount of the rent and if the landlord sued merely for the reasonable value of the use and occupation. Then, as it would be a necessary part of the landlord's case to establish what was a reasonable charge for rental, the burden of proving it would be upon him. This was the rule prior to the enactment of the recent rent legislation and it has not been changed thereby.

Final order should be reversed, with ten dollars costs to appellant to abide the event, and a new trial ordered.

KELBY and LAZANSKY, JJ., concur.

Order reversed.

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SAMUEL TUNICK, Appellant, v. FEDERAL FOOD STORES, INC., Respondent.

(Supreme Court, Appellate Term, Second Department, December, 1921.)

Landlord and tenant — life estate — acceptance of rent by remaindermen renders previous lessee a tenant at sufferance — evidence — notice that holding over after death of life tenant would be by the month only, held admissible.

A life tenant of certain real property leased it for a term of two years from November 1, 1919, with privilege of renewal for three years. From and after the death of the lessor on November 23, 1920, the tenant continued to pay rent to the remaindermen. The grantee of the remaindermen under a deed of conveyance of the premises made June 2, 1921, as petitioner in summary proceedings, claimed that he permitted the tenant to remain as a monthly tenant and that the last term expired July 31, 1921. It was admitted that when petitioner signed the contract to purchase the premises he knew of the original lease. Upon holding that the acceptance by the remaindermen of the rent reserved in the original lease was a ratification and adoption thereof, and that the petitioner's acceptance of rent for several months was also a ratification of said lease, the trial justice dismissed the petition. *Held*, that the acceptance of rent by the remaindermen changed the status of the tenant, who would otherwise have been a trespasser, to a tenant at sufferance.

Upon the death of the life tenant it was proper for petitioner to notify the tenant that its holding over would be by the month only, and the refusal of the court to receive in evidence the notice to that effect on the ground that it was a self-serving declaration, was error; the evidence should have been admitted as tending to prove a valid contract between the parties, and the final order dismissing the petition will be reversed and a new trial granted.

APPEAL by the landlord from a final order dismissing his petition to regain possession of the premises occupied by the tenant as a store only, after a trial in

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the Municipal Court of the city of New York, borough of Brooklyn, second district.

Robert M. Johnston, for appellant.

W. A. Fischer, for respondent.

KELBY, J. The premises in question were formerly owned by one Frederick Erlenwein, who died seized of said premises, leaving a last will and testament, which was duly probated in the Surrogate's Court in July, 1914. By the terms of this will the premises in suit were devised absolutely to the children of said decedent, in equal shares, subject to a life estate of the testator's widow, Ida Erlenwein. On September 18, 1919, the said life tenant, Ida Erlenwein, being in possession of the premises under the terms of said last will, entered into a written agreement with the Federal Food Stores, Inc., the tenant herein, for a term of two years, from November 1, 1919, and with the privilege of renewal of three years.

The tenant went into possession under this lease from the life tenant, and the life tenant died on November 23, 1920, whereupon the fee of said premises became vested in the children of Frederick Erlenwein.

On June 2, 1921, by deed from these children, the plaintiff, Samuel Tunick, took title to the premises in fee. From and after the death of the life tenant the present tenant, the Federal Food Stores, Inc., continued to pay rent to the remaindermen under the will, and the present petitioner permitted the present tenant to remain, as he claims, a monthly tenant from month to month, and claiming that the last term expired on July 31, 1921.

The appellant in his brief states that " the tenant continued paying the rent specified in said lease up

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to the time of this proceeding to Charles Erlenwein, the executor, under the last will and testament of Frederick Erlenwein, deceased. He then paid it to Samuel Tunick, the new owner and petitioner herein, in June, 1921." It is admitted that the existence of the original lease to the present tenant was known to the present landlord before he signed the contract to purchase the property.

The trial justice disposed of the case by holding that the acceptance of rent, reserved in the lease, by the remaindermen after the death of the life tenant was a ratification and adoption of the lease of the life tenant, and that the present owner likewise ratified the lease by accepting the amount reserved in the life tenant's lease for a period of a few months.

In the case of *Williams* v. *Alt*, 226 N. Y. 283, 288, it was held that when the life tenant died the lease made by him as owner of a life estate terminated. The court in that case cited section 1664 of the Code of Civil Procedure, which reads as follows: "A person in possession of real property, as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession, after the determination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser. An action may be maintained against him, or his executor or administrator, by the person so entitled, or his executor or administrator, to recover the full value of the profits, received during the wrongful occupation."

The tenant, therefore, was a trespasser if he held over and continued in possession after the termination of the life estate without the express consent of the owner, that is, the remaindermen under the will of Frederick Erlenwein, deceased. But in this case

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the remaindermen did consent by accepting rent, and, therefore, changed the status of the tenant from that of a trespasser to a tenant at sufferance.

In the case of *Coakley* v. *Chamberlain*, 8 Abb. Pr. (N. S.) 37, it was squarely held that "The mere fact that the remaindermen, by an action instituted for that purpose, collected the rent reserved by the lease, from the death of the life tenant up to the time of the final partition of the premises, cannot be construed into an adoption and ratification of such covenant on their part." And so in the case of *Hinton* v. *Bogart*, 166 App. Div. 155, where the court said: "Undoubtedly by the death of the life tenant the lease by her of the property terminated and plaintiffs as owners of the property became entitled to possession thereof. Defendant, however, continued in possession of the premises and continued to pay the rent reserved by the lease and the taxes upon the property down to May 1, 1910, at which time by the notice served upon the defendant plaintiffs required defendant to deliver possession of the property to them. There can be no question, I think, that upon the continuance in possession of the premises, holding under the lease, defendant became tenant at will, and became liable for the use and occupation; the value of the use and occupation to be determined by the amount defendant agreed to pay as rent during the continuance of the lease."

To the same effect see *Guthmann* v. *Vallery*, 51 Neb. 824, the court holding in that case that a lessee remaining in possession after the termination of the life estate, in the absence of an express contract with the reversioner, becomes liable to the latter for the reasonable value of the use and occupation of the premises, but not liable on the contract with the tenant for life.

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The trial justice was, therefore, in error when he held that there was a ratification of the life tenant's lease.

Another matter appears in the record, and as there is to be a new trial mention should be made of it. It appears that upon receipt of the rents for the months of June and July from the tenant, the present owner caused his attorney to serve a notice upon the tenant to the effect that the new owner would accept the rent from the tenant from month to month only, and that this notice was sent to the tenant at its place of business. The court refused to receive this notice in evidence on the ground that it was a self-serving declaration.

As the tenant became a tenant by sufferance only after the death of the life tenant it was proper for the present landlord to notify the tenant that its holding over in the future would be by the month only, and this evidence was competent and should have been admitted as tending to prove a valid contract between the parties.

For these reasons the final order is reversed and a new trial granted, with ten dollars costs to the appellant to abide the event.

CROPSEY and LAZANSKY, JJ., concur.

Order reversed.

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EMILIE WELLBROCK, Respondent, *v.* JOHN HAAS, Appellant.

(Supreme Court, Appellate Term, Second Department, December, 1921.)

Mortgages — satisfaction of — cities of the first class — lost document — legal services — where neither the original mortgage nor order dispensing with its production is presented, owner may recover from holder of mortgage value of attorney's services in procuring order — Real Property Law, § 322.

The owner of mortgaged premises, upon payment to the attorney of the assignee of the mortgage of the balance due thereon, demanded a satisfaction piece and the original bond and mortgage which upon the assignment thereof had not been delivered to the assignee but were thereafter accidentally destroyed. The attorney for the assignee accepted the payment and gave a receipt which *inter alia* stated that the original papers and satisfaction piece duly executed were to be procured from the assignee and delivered to the mortgagor. The mortgagee, though he did execute a satisfaction piece and delivered it to the attorney of the owner of the premises, failed to obtain an order dispensing with the production of the original mortgage, so that it might be discharged of record. *Held,* that the case being one in which section 322 of the Real Property Law applied, the owner of the premises was entitled to recover of the assignee of the mortgage the agreed value of an attorney's services in procuring such an order and a judgment for that amount will be affirmed.

Matter of Black, 150 App. Div. 532, distinguished.

DEFENDANT appeals from a judgment rendered in the Municipal Court of the city of New York, borough of Queens, third district, for fifty dollars in favor of the plaintiff.

Charles Oechler, for appellant.

William H. O'Hare, for respondent.

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KELBY, J. The case was submitted upon the following agreed facts: The plaintiff Wellbrock was the owner in fee of certain premises, at Glendale, L. I., and the defendant was the owner of a mortgage thereon. In 1910, the then owner of the premises made a mortgage to one Henry Hohsfeld, and wife, to secure the payment of $2,500. December 7, 1912, the said bond and mortgage were assigned to the defendant John Haas, and for some reason or other the original bond and mortgage were not delivered to Haas, and were thereafter accidentally destroyed. On October 3, 1916, the defendant Haas released all the premises covered by the mortgage except the lot which thereafter became the property of the plaintiff. The plaintiff received all notices of due dates from, and made all payments of interest to Charles Oechler, as attorney for John Haas. In August, 1920, the defendant John Haas duly demanded payment of the mortgage, which was long past due. On September 3, 1920, the plaintiff paid the balance due on said mortgage to Charles Oechler, as attorney for Haas, and demanded a satisfaction piece and the original bond and mortgage. Oechler being unable to deliver the papers at that time, accepted payment and delivered a receipt. Among other things the receipt states that the original papers and satisfaction piece duly executed and acknowledged are to be procured from Mr. Haas and delivered to Mrs. Emilie Wellbrock. On November 3, 1920, Oechler wrote to the plaintiff stating that the original bond and mortgage could not be located, and that it would be necessary for the plaintiff to get an order from the court to cancel the mortgage of record; that he would have Mr. Haas sign a satisfaction piece, but this could not be recorded without the original mortgage, and suggested that the plaintiff communi-

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cate further with him. Immediately upon receipt of this letter the plaintiff demanded of the defendant that he procure the order dispensing with the production of the original mortgage, and notified him that in default thereof, she would retain counsel to do so, at his (the defendant's) expense. The defendant duly offered to execute a satisfaction piece and did execute a satisfaction piece and delivered the same to plaintiff's attorney; and this satisfaction piece, drawn by the attorney for the defendant and executed and duly acknowledged by the defendant without cost and expense to the plaintiff, was used to satisfy the mortgage of record. The defendant was also ready and willing to execute any and all affidavits which he could make in order to obtain the discharge of the mortgage of record, and did make, execute and deliver, without cost to the plaintiff, the affidavit signed by the defendant attached to the papers and stipulation. Defendant failed to obtain the order dispensing with the production of the mortgage and plaintiff thereupon retained counsel who did procure the order. It was agreed that the value of the services rendered was fifty dollars. The question submitted to the court for decision was: "Is the defendant as a matter of law liable for the legal services of the plaintiff in obtaining the order for the discharge of the mortgage?"

No cases directly in point are cited by either counsel. In the case of *Krulder* v. *Hillman*, 57 Misc. Rep. 209, which was an action in equity, the court held that "Where a mortgagor, upon payment of the mortgage, presents a drawn satisfaction piece, the mortgagee, upon tender to him of twenty-five cents, the fee allowed by law for taking his acknowledgment, is legally bound to sign and acknowledge the satisfaction piece on request and deliver up the bond and

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mortgage. The mortgagee, after payment of the mortgage debt, has no right to refuse to deliver a bond and mortgage unless the mortgagor pays him $2.50 for preparing and executing his own satisfaction piece."

The rule still obtains that the cost of the satisfaction piece and its execution is on the debtor, but that is really a matter of contract between the parties. Here, however, there is an intervening cause, namely, the failure of the assignee of the mortgage to get possession of the mortgage and with no fault at all on the part of the mortgagor.

Section 322 of the Real Property Law (formerly section 270a) provides that in counties wholly embraced in cities of the first class no mortgage shall be discharged of record, unless, in addition to the satisfaction piece required by section 321, there shall be presented to the recording officer for cancellation the original mortgage, or a certified copy of an order made and entered as provided in section 322. It is further provided in this section that "any person having any interest in securing the discharge of the same may apply to the supreme court or the county court in or of the county in which the property affected by the mortgage * * * is situated, upon a petition duly verified * * * showing the loss, mutilation or destruction of the mortgage, * * * or the impossibility of producing said mortgage, * * * for an order dispensing with the production of the said mortgage and directing the discharge thereof."

In the case of *Matter of Leckie*, 131 App. Div. 816, it appeared that Leckie was the mortgagee of certain real property in the city of New York, and that the mortgagee had lost the mortgage after it had been placed on record. The mortgagee was the petitioner and showed his inability to produce the mortgage,

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that the owner of the property was under contract to convey it free and clear of encumbrances, and that the owner desired to pay the mortgage, and the petition prayed for an order permitting the mortgage to be discharged of record upon the production of the satisfaction piece, without the production of the mortgage; and seeking to get an order dispensing with the production of the original mortgage. The register of the county of New York resisted the application on the ground that it did not appear that the mortgage had already been paid, and the court at Special Term denied the application on the ground of non-payment only. On appeal to the Appellate Division that court said: "While the language of the section is not as clear as it might be, it is perfectly plain that it provides a means whereby a mortgagee may properly satisfy of record a mortgage which he is unable to produce because of its loss or destruction. * * * Anticipating that such a situation might arise the Legislature prescribed that he might apply to the court, setting forth the loss * * *, and if those reasons were satisfactory the court was given power to order the mortgage canceled * * *. Without this provision a mortgagee whose mortgage had been lost or destroyed might not be able to receive payment, for the owner would be justified in refusing to pay over his money on the satisfaction piece alone, unless it was accompanied by either the mortgage or an order dispensing with its production."

If, as said by the court in the last quoted case, the owner would be justified in refusing to pay over his money on tender of the satisfaction piece alone, unless it was accompanied either by the mortgage or by an order dispensing with its production, it would seem that equity and good conscience demand that the mortgagee in this case, who had either lost the

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mortgage or failed to receive it, should pay the reasonable cost of obtaining the order for dispensing with the production of the original mortgage.

The case of *Matter of Black*, 150 App. Div. 532, cited by the appellant, is not in point. That case held merely that a person having an interest in procuring the discharge of a mortgage, which had been lost, should, upon proof of the facts, apply under section 322 of the Real Property Law for an order dispensing with the production of the original mortgage, and should not proceed under section 333 of said law, which latter section applies only to cases of wilful neglect or refusal to produce the original mortgage. In that case, the mortgagor, well knowing that the mortgage had been destroyed by fire and knowing the inability of the mortgagee to produce the mortgage, tendered payment of the mortgage and coupled his tender of payment with the condition that the original mortgage be delivered to him simultaneously with the payment. In the course of this opinion the court took to task the technical position of both parties to the controversy, and some of the words of this criticism are now used by the appellant as alleged authority for his position.

The judgment appealed from should be affirmed, with twenty-five dollars costs.

CROPSEY and LAZANSKY, JJ., concur.

Judgment affirmed.

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WILLIAM E. SINGLETON and Another, Plaintiffs, v. JOHN J. MCGURK, Defendant.

(Supreme Court, Bronx Special Term, December, 1921.)

Easements — water pipes — injunction — oral agreement — receipt — when rights pass as appurtenant to land, though not mentioned in deed — estoppel — Real Property Law, § 243, not applicable — nominal damages.

Where in an action to restrain the defendant from interfering with pipes laid across his premises to conduct water to plaintiffs' house, the court is satisfied that a writing given by defendant to plaintiffs' predecessor in title acknowledging the receipt of a certain sum of money "for water connection and privilege for two families until water in street is supplied by the city" substantially embodies an oral agreement originally made between the parties several years before, it will be held that such agreement is more than a license and that it is in substance and effect an easement in defendant's land until water is supplied by the municipality in that part of the street in which the premises of plaintiffs are situated.

The rights and easement acquired by plaintiffs' predecessor in title to maintain the water pipes, etc., passed as appurtenant to the land upon the conveyance of the dominant estate to plaintiffs although not specifically mentioned in the deed to them.

Where by the acts and conduct of defendant and his wife, joint owners of the lot in the rear of the premises of which defendant was the sole owner, plaintiffs' grantor was led to believe that defendant was also the sole owner of said rear lot, through which the pipes were also laid and maintained by plaintiffs' grantor to the knowledge of defendant's wife who was present when the money for which the receipt was given was paid to her husband and she made no objection either to the laying of the pipes or to their maintenance or to the supply of water, until about two months after the conveyance of the premises to plaintiffs, when she served upon them a written notice that the water would be shut off in thirty days, the consent of defendant's wife, in the circumstances, will be presumed and defendant estopped from questioning such consent.

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The servient tenement being still in the same ownership as it was when the pipes were laid, the writing both at common law and under the statute was good as between the parties and a contention that it was ineffectual to pass an easement because it was neither witnessed nor acknowledged, is untenable, as section 243 of the Real Property Law did not apply.

Judgment for plaintiff as indicated in the opinion and for nominal damages, fixed at six cents.

ACTION to restrain the defendant from cutting off or disconnecting the pipes supplying water to the plaintiffs' premises.

William A. Keating, for plaintiffs.

Joseph L. Zoetzl, for defendant.

GIEGERICH, J. The action is to restrain the defendant from interfering with pipes laid across his premises to conduct water to the plaintiffs' house and premises or with the supply of water therefrom. In 1914 one Thomas Gilday was the owner of the premises on the southerly side of East Two Hundred and Thirty-first street, in the borough of The Bronx, New York city, known by the street number 1094 East Two Hundred and Thirty-first street, and the defendant was the owner of the premises known as No. 1050 East Two Hundred and Thirty-second street in said borough, the said premises being situated on the southerly side of the street last mentioned. By a parol agreement made in that year between Gilday and the defendant a water pipe was laid from the defendant's house through a lot owned by him and a lot in the rear thereof and through the roadway of East Two Hundred and Thirty-first street to Gilday's premises for the purpose of conducting a supply of water from the defendant's house to that owned by Gilday. Subsequently a receipt was signed by the

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defendant and delivered by him to Gilday, which reads as follows: "Oct. 27th, 1916. Received from Thomas Gilday the sum of $15.00 for water connection and privilege for two families until water in street is supplied by the city. John J. McGurk, 1050 East 232." Thereafter Gilday conveyed the premises so owned by him to the plaintiffs by deed bearing date October 5, 1920, and recorded in the register's office of Bronx county on October 6, 1920. This deed does not recite the foregoing receipt or instrument, or make any mention of any right to lay a water pipe across the defendant's premises, but such receipt was transferred and delivered to the plaintiffs at the time they took title to the premises. After such conveyance the supply of water was continued by the defendant, and he made no objection to the maintenance of the water pipes through his premises until December 31, 1920, on which date the defendant's wife handed to Mrs. Singleton a notice that the water would be shut off in thirty days. After the service of such notice the water was shut off at various times. The defendant denies that he turned off the water or that he ever saw it turned off on his premises. The defendant's wife, however, admitted that she turned off the water, or had it turned off on a few occasions by reason of breaks or leaks in the water supply pipe. The plaintiffs have paid to the department of water supply, gas and electricity the sum of fourteen dollars for the water rent for the calendar year of 1921 for water supplied and to be supplied to their premises. The city of New York has not shut off the water or reduced the pressure in East Two Hundred and Thirty-second street at any time since December 31, 1920, to the date of the trial of this action, and there has been no break in any water main or any of the pipes in East Two Hundred and Thirty-first street or

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Two Hundred and Thirty-second street during that period. The pressure at the premises of the plaintiffs and the defendant is enough to supply four or five houses. Water is not as yet supplied by the city of New York in East Two Hundred and Thirty-first street. The testimony as to the nature of the agreement made orally in 1914 is conflicting, but the evidence satisfies me that the receipt or instrument of October 27, 1916, substantially embodies the parol agreement originally made between the parties. The defendant insists that the consent of his wife to the maintenance of the water pipe on the lot in the rear of his premises (through which the pipes were also laid) was necessary and that it was never obtained. This contention is based upon the conveyance of the rear lot to the defendant and his wife about five years before the receipt or instrument in question was given. Neither the plaintiffs' grantor nor the plaintiffs ever knew or heard of such conveyance until after the water supply was cut off. By the acts and conduct of the defendant and his wife at the time when the agreement was made and the money was paid the plaintiffs' grantor was led to believe that the defendant was the sole owner of such rear lot. Although the defendant's wife knew that the pipes were laid across that lot and were being maintained by the plaintiffs' grantor and the plaintiffs, and she was present when fifteen dollars was paid by the plaintiffs' grantor to her husband, and when the receipt therefor was given she never made any objection to the laying of the pipes or to their maintenance or to the supply of water until the service of the notice of December 31, 1920. Under these circumstances the consent of the defendant's wife may well be presumed, and it seems to me that the defendant by his acts is estopped from questioning such consent. 11 Am. & Eng. Ency. of Law

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(2d ed.), 427, 428. The defendant contends, furthermore, that the agreement made between the plaintiffs' grantor and himself is a personal, non-assignable and revocable license issued only to the plaintiffs' grantor. The plaintiffs, on the other hand, maintain that the receipt created an easement which is binding on the defendant. I am of the opinion that the agreement so embodied in the receipt or instrument in question is more than a license and that it is in substance and effect an easement in the defendant's land until water is supplied by the city of New York in that part of West Two Hundred and Thirty-first street, where the premises conveyed by Gilday to the plaintiffs are situated. *Wiseman* v. *Lucksinger,* 84 N. Y. 31; *Nellis* v. *Munson,* 108 id. 453; *Clark* v. *Strong,* 105 App. Div. 179; *Borough Bill Posting Co.* v. *Levy,* 144 id. 784. An interest for the term above mentioned is not an absolute fee because it is possible that it may at some time be terminated. It is a base or qualified fee or freehold estate. *Clark* v. *Strong, supra;* Gerard Titles (5th ed.), 129. The rights and easement acquired by Gilday to maintain the water pipes laid on the defendant's land and to connect such pipes from his house to that of the defendant are appurtenant to such land and passed as an appurtenance with the conveyance of the dominant estate to the grantees of Gilday, the plaintiffs in this action, although not specifically mentioned in the deed. *Biggs* v. *Sea Gate Assn.,* 211 N. Y. 482, and cases cited; 19 C. J. 935. Inasmuch as the agreement in the present case is in writing, the case of *Cronkhite* v. *Cronkhite,* 94 N. Y. 323, relied on by the defendant in support of his contention that such agreement is too indefinite, vague and uncertain for enforcement in equity, has no application. There no written agreement was proved, and the plaintiff relied upon parol proof of

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the declaration and acts of the parties which, as he claimed, established the right to use the water in the spring by adverse possession for a period of forty years and over, and it was held that an oral contract which equity will regard as equivalent to the grant required at common law or by statute must be a complete and sufficient contract in all its parts. Although the agreement in the instant case is short in form, it is, nevertheless, sufficiently comprehensive and definite to be enforced in a court of equity. Another point urged by the defendant is that because the said agreement or instrument of October 27, 1916, is not witnessed or acknowledged as required by section 243 of the Real Property Law it is fatally defective. The provisions of the said section, however, do not apply to a grant in fee or of a freehold estate unless there is a subsequent purchaser or incumbrancer. In other words, such a grant "does not take effect as against a subsequent purchaser or incumbrancer until so acknowledged." In the case at bar the servient tenement is still in the same ownership as it was at the time when the pipes were laid and the instrument above referred to was signed and delivered, and both under the statute and at common law the said instrument is good between the parties. *Strough* v. *Wilder*, 119 N. Y. 530; *Hill* v. *Bartholomew*, 71 Hun, 453; *Voorhees* v. *Presbyterian Church of Amsterdam*, 17 Barb. 103. Even if the instrument in question were ineffectual to grant an easement, still as the plaintiff's grantor furnished the water pipes and laid them and paid $15 to the defendant for the privilege, upon the faith of the agreement, the plaintiffs would be protected in equity. *City of N. Y.* v. *N. Y. & S. B. Ferry & S. T. Co.*, 231 N. Y. 18. The evidence satisfies me that the defendant has threatened to completely and permanently cut

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off the water supply and prevent any water from being supplied to the plaintiffs. Such threatened invasion of the plaintiffs' rights should be restrained, and they are clearly entitled, in view of all the facts and circumstances of the case, to judgment restraining the defendant from cutting off or disconnecting the pipes supplying the house and premises of the plaintiffs from the water system of the defendant, from cutting or shutting off the water from the plaintiffs' house and from interfering with, impeding or hampering in any manner with the free, full and undiminished flow of water to the plaintiffs' premises. The plaintiffs also seek damages claimed to have been sustained by reason of the defendant's alleged interference with their water supply. The evidence, however, is wholly insufficient to warrant the award of any except nominal damages, which I fix at six cents. My conclusion, therefore, is that the plaintiffs are entitled to judgment to the extent above indicated, with costs and disbursements. As counsel may wish to submit requests to find in accordance with the views above expressed, they are at liberty to withdraw the requests already submitted and to substitute new ones within five days after the publication hereof. All papers received by me, including stenographer's minutes, exhibits, copy pleadings, briefs, requests for findings and filed papers, have been returned to the clerk, to whom all further papers should be handed in, with proof of service.

Judgment for plaintiffs.

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BROOKLYN HEBREW HOME AND HOSPITAL FOR THE AGED, Plaintiff, *v.* JEWISH HOME FOR AGED AND INFIRM, Defendant.

(Supreme Court, Kings Special Term, December, 1921.)

Injunction — unfair use of corporate name — charitable institution restrained from using name and from advertising so as to lead public to confuse its activities with those of an earlier established like institution.

An injunction may be granted to restrain an unfair and a misleading use of a corporate name.

In an action by the "Brooklyn Hebrew Home and Hospital for the Aged," a duly organized membership corporation, well known in Brooklyn where it has long labored in its particular field of care of aged and infirm Jewish people, having in 1920 paid more than $60,000 for the maintenance for its home and hospital, to restrain the officers and agents of the "Jewish Home for Aged and Infirm," a Mount Vernon institution which has transferred its activities to the borough of Brooklyn, from using its corporate name so as to lead the public to believe that both institutions are one and the same, an injunction *pendente lite* will be granted enjoining defendant from circularizing and advertising in such a manner as to confuse the public as to the identity of both institutions and from holding its affairs, social and charitable, in such a way as to deceive the public and lead it to believe that the public affairs held by the defendant and by the plaintiff are one and the same.

MOTION for injunction *pendente lite.*

Grover M. Moscowitz (Meier Steinbrink, of counsel), for motion.

Jenks & Rogers (Almet F. Jenks, of counsel), opposed.

DIKE, J. This is a motion for an injunction *pendente lite.* Plaintiff asks for an order enjoining and restraining the defendant, its agents and officers, from

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using the name Jewish Home for Aged and Infirm, from circularizing and advertising in such a manner as to lead the public to believe that the plaintiff and the defendant institutions are one and the same; further seeking to enjoin the defendant from operating in Brooklyn, and for other relief.

The complaint sets forth that the plaintiff is a domestic corporation duly incorporated on the 10th day of August, 1907, pursuant to the provisions of the Membership Corporations Laws of the state of New York, and that the said certificate of incorporation was filed in the office of the county clerk of Kings county on the 14th day of August, 1907, under the name Brooklyn Ladies Hebrew Home for the Aged, and duly approved by the state board of charities; that thereafter the name of the plaintiff was duly changed to the Brooklyn Hebrew Home for the Aged, in 1913; that thereafter the name of the plaintiff was again changed to the Brooklyn Hebrew Home and Hospital for the Aged, and the certificate duly filed in the office of the secretary of state of New York and also in the office of the clerk of the county of Kings in March, 1918; that the purposes were that said institution be organized for the purpose of assisting Hebrew aged, poor men and women in accordance with the Hebrew dietary laws and religious customs, and give medical and surgical treatment to those aged incurables maintained in the home, and later filing a certificate extending the objects and purposes of the corporation so that it might maintain and operate a hospital in conjunction with its home. The principal office of the plaintiff corporation was set forth as being in the borough of Brooklyn, city of New York, county of Kings. The home and hospital are situated at Howard and Dumont avenues, for the purposes set forth in the certificate. Enlargements have

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been made to the plant so that 450 inmates shortly will be able to be accommodated. That the defendant corporation was incorporated under the Membership Corporations Law pursuant to chapter 35 of the Consolidated Laws of 1909, under the name of Jewish Home for Aged and Infirm, on the 28th day of February, 1912, and its certificate of incorporation was filed with the county clerk of New York county on May 4, 1912. In that certificate of incorporation appears the following: "The name of the city in which the principal office of said corporation is to be located is the City and County of New York; the place where the home aforesaid is to be erected is the City of Mount Vernon, State of New York." That in the certificate from the state board of charities to the defendant, dated the 21st day of February, 1912, there is an approval of the incorporation "of the said Jewish Home for Aged and Infirm, located at Mount Vernon, New York." That on or about August, 1920, it was announced that a home was to be purchased in the Bushwick section of the borough of Brooklyn, and circulars bearing the name of the Jewish Home for Aged and Infirm were distributed.

In the voluminous affidavits submitted, plaintiff contends that there has arisen great confusion among donors and supporters of the plaintiff institution as to the identity of these institutions, and in which were cited instances of monetary gifts having been received by the defendant that were intended for the plaintiff.

The plaintiff institution is well known in the borough of Brooklyn, and some idea of its substantial activities may be gained from the fact that in the year 1920 there was paid for maintenance of that institution the sum of $65,270.76. The defendant institution has accommodations at present for twenty-five inmates.

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Instances of activities on the part of the officers and managers of the defendant have been brought to the attention of the court, from which the court is asked to conclude that a system of procedure has been adopted tending to confuse the public and to divert from the plaintiff institution that financial support which it had been led to count on in the past. Several instances were cited on the argument. The annual ball of the plaintiff institution was held on February 5, 1921, at the Brooklyn Academy of Music; on the same night the defendant institution had its dance at the Ritz-Carlton. On April 2, 1921, an auxiliary of the plaintiff held an affair at the Thirteenth Regiment Armory; on the same night the auxiliary of the defendant held its affair at the Waldorf-Astoria. The plaintiff institution instituted a dollar campaign, starting the same in August, 1920, in order to raise funds for the plaintiff institution; the defendant institution also inaugurated a dollar campaign along the same lines, the circulars and advertising being similar in style and appearance to those used by the plaintiff institution. The excerpt of the minutes of the board of trustees of the plaintiff institution shows that the dollar campaign was discussed as early as July of that year and before the defendant institution inaugurated its campaign. Other instances have been presented, such as newspaper articles descriptive of a social and charitable function of the defendant, wherein names of those identified with the plaintiff institution were included. The defendant institution and its officers cannot necessarily, from these, be charged with having instigated any such description in the newspapers. But several instances of this are cited, which obviously must have confused those reading such notices in the press. Many affidavits have been submitted in behalf of the plaintiff by

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citizens who have set forth how greatly they were deceived by notices, and requests for donations.

It seems to me there is ample authority for an application of this kind; and the court has relieved in other instances by injunction where it felt that there was an unfair and a misleading use of a corporate name, and in cases, too, of organizations similar to those now being discussed in this proceeding. Such a case is *B. P. O. Elks* v. *Improved B. P. O. Elks,* 205 N. Y. 459, and *Salvation Army in U. S.* v. *American Salvation Army,* 135 App. Div. 268, where the plaintiff was restrained from using its corporate name "or a name so nearly resembling it as to be calculated to deceive the public and the friends, patrons and adherents * * * ; leading the public to believe that the defendant is the plaintiff for the purpose of securing credit or subscriptions." And later, "While its object in organizing may have been entirely laudable, its assumption of the physical attributes of its predecessor in the field, with slight and colorable differences, was obviously an imitation and calculated, if not deliberately designed, to deceive."

The defendant institution was a Mount Vernon institution and it has transferred its activities now to the borough of Brooklyn. The defendant institution may have entered the broader field of activity in the borough of Brooklyn from the most laudable designs. There can be no monopoly in charitable activities. No one should be deprived of the luxury of doing good. But it is, it seems to me, a proper question always as to the methods. If the methods are improper or unfair, to the harm and detriment of others with established rights, even if the results are meritorious, such methods should be discouraged.

There is a vast field in this great borough of

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Brooklyn for just such activities as are indicated in the certificates of incorporation of both of these parties. To maintain institutions of this kind requires the most exhaustive and exhausting labor on the part of those interested. There should be no limit to wise and generous development of such activities. There may always be, however, proper criticism where deserved, if the methods pursued to effect such development tend to curtail such laudable activities and cripple the financial standing of such a beneficent institution.

The defendant institution transferred its activities from a distant county of the state to this borough. It came into a territory where plaintiff's institution had long labored in the particular field of care of the aged and infirm Jewish people, and it would seem, inasmuch as the work of both institutions was substantially along the same lines, the aims of both were almost identical, and the people it was desired to assist were of the same faith, that the defendant would seek to co-operate with the institution so fully established here; but instead of help it appears there has been harm, a spirit of rivalry instead of a spirit of generous co-operation in charitable endeavor.

I therefore feel, although this is an extraordinary remedy that is sought, that the plaintiff has shown justification in seeking the relief asked for. The defendant institution has many supporters who unquestionably will be anxious and willing to continue to support the beneficent aims of that institution, and I feel confident that the great majority of such supporters will be willing to free themselves from any criticism of unfair methods. Therefore, I grant the motion for an order enjoining and restraining the defendant, its agents and officers from using the name Jewish Home for Aged and Infirm; from circularizing and advertising in such a manner as to confuse

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the public as to the identity of these institutions; from holding its affairs, social and charitable, in such a way as to deceive the public and to lead them to believe that the public affairs held by the defendant and the plaintiff are one and the same. This relief I grant *pendente lite*, feeling that there will undoubtedly be an early trial of the issues raised by the pleadings herein. Submit order on notice. No costs.

Motion granted.

LEAH PERLMAN, Plaintiff, *v.* BROOKLYN CITY RAILROAD COMPANY and HARRY PERLMAN, Defendants.

(Supreme Court, Kings Special Term, December, 1921.)

Negligence — wife cannot sue husband to recover damages for personal injuries.

In the absence of statute a wife cannot sue her husband to recover damages for personal injuries alleged to have been sustained through his negligence.

Where in an action for damages based upon the negligence of the plaintiff's husband the complaint alleges that a collision between a trolley car of the impleaded defendant and an automobile owned and driven by plaintiff's husband, occurred by reason of his negligence and that of the motorman of the trolley car, a motion for judgment on the pleadings and for a dismissal of the complaint as against the husband will be granted, but without costs.

MOTION by defendant Harry Perlman for judgment on the pleadings and for a dismissal of the complaint as against him in an action brought by his wife for damages for personal injuries alleged to be due to the joint negligence of the defendants.

Emanuel Greenberg, for plaintiff.

Bertram L. Pettigrew, for defendant.

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KAPPER, J. The plaintiff, Leah Perlman, sues her husband, Harry Perlman, for negligence. With him she impleads the Brooklyn City Railroad Company, claiming that a collision occurred between a trolley car of said railroad company and an automobile owned and driven by her husband, in which she was riding at the time by his invitation. She charges that the collision occurred through the negligence of her husband and the motorman of said trolley car. The defendant husband now moves for judgment on the pleadings and for a dismissal of the complaint, claiming, through his attorney, that an action by a wife against her husband for negligence will not lie. In this respect I think the husband's attorney is right, although what the husband himself actually thinks about it is not made known to me. If it were not for the repeated admonition of our appellate courts that the subject of casualty insurance should not be referred to in this class of litigation, I should indulge in the presumption that the husband is not only insured against liability for negligently causing injury, but that if he were not we should hardly be confronted with this suit against him. A husband and wife, living in a state of connubial felicity and enjoying each other's society in an automobile pleasure ride, suggests little in consonance with the wife's desire to transfer money from the pocket of her husband to her own pocket because his inadvertence has caused her a personal hurt. However all this may be, the law is settled that a wife cannot sue her husband for damages for assault and battery (*Abbe* v. *Abbe*, 22 App. Div. 483; *Schultz* v. *Schultz*, 89 N. Y. 644; *Longendyke* v. *Longendyke*, 44 Barb. 366), nor may she sue her husband to recover damages for slander. *Freethy* v. *Freethy*, 42 Barb. 641. These cases proceed on the theory that the common-law unity of hus-

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band and wife is a bar to the maintenance of the action in the absence of an express statute permitting it. In *Coleman* v. *Burr*, 93 N. Y. 17, 24, the Court of Appeals say: "The statutes referred to touch a married woman in her relations to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each to the other remain as they were at common law." Section 57 of the Domestic Relations Law is identical in language with section 27 of the original Domestic Relations Law. Laws of 1896, chap. 272. The statute provides that "a married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation as if unmarried." It was referred to in *Abbe* v. *Abbe, supra,* as working no change in the law in so far as concerns an action for tort brought by wife against husband. And referring further to the statute and its meaning, Mr. Justice Hatch in the *Abbe Case, supra,* said: "The claim which seeks to authorize the action, based upon the language 'for an injury arising out of the marital relation,' must fail. In no sense does an assault and battery arise out of the marital relation. It is as violently opposed to such relation as is larceny to the eighth commandment." This being so of willful torts, such as assault and slander, I think the same view must be taken of the milder tort, namely, an action for damages based upon the husband's negligence. Regarding the above cited cases, which involved willful torts, I may say that, were they cases of first impression, I should be inclined to view them more favorably for the plaintiffs, for if a married woman may sue her husband for a willful act, such as conversion, fraud, etc., involving her separate prop-

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erty, it should logically follow that her person at least should be held inviolate from injury by her husband's willful wrong, and for a wanton transgression thereof an action should be maintainable. But in the case of mere negligence on the husband's part the maintenance of an action for damages seems to me incompatible with the marital status and, in the absence of statute, may not be permitted. The same reason that led the court in the *Abbe Case, supra*, to strike out an award of costs rendered against the wife upon the dismissal of her complaint should be applied here, and the motion for judgment on the pleadings and for a dismissal of the complaint as against the defendant husband is granted, without costs.

Motion granted.

In the Matter of the Application of JOSEPH E. HOLCOMB for a Warrant to Search Premises Known as 9 Delaware Street, Tonawanda, New York.

(County Court, Erie County, December, 1921.)

Intoxicating liquors — search and seizure — state rights — concurrent jurisdiction — state, not federal, decisions controlling — proceeding under section 802-b of the Code of Criminal Procedure in rem not criminal proceeding — proof by fair preponderance of evidence not beyond reasonable doubt — issue should be raised by answer, not by special motion to vacate search warrant — general entrance to building sufficient description for search of whole premises — section 801, Code of Criminal Procedure, not applicable — affidavit — inventory.

The statute authorizing the seizure and forfeiture of liquor kept for unlawful traffic (Code Crim. Pro. § 802-b, added by Laws of 1921, chap. 156) is but a re-enactment, almost verbatim, of section 33 of the old Liquor Tax Law, and was a part of the law of the state long before the Eighteenth Amendment to the Constitution of the United States was seriously contemplated.

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Upon the passage of the said amendment the states did not lose any of their police power over the regulation of the liquor traffic, except the right to enact statutes not in accordance with said amendment, and the federal government acquired thereby only concurrent and not exclusive jurisdiction in the enforcement of laws relating to the liquor traffic; where, therefore, a seizure of liquor is made under and by virtue of the authority of the state of New York the trial court is bound by the decision of the appellate courts of this state and the decisions of the federal courts are not controlling.

A proceeding under section 802-b of the Code of Criminal Procedure is to be treated as one *in rem* and not as a criminal proceeding, and the state need only prove its case by a fair preponderance of evidence and not beyond reasonable doubt.

Where by the search warrant issued pursuant to section 802-b of the Code of Criminal Procedure notice was given to all persons claiming any right, title or interest in liquors seized thereunder, in a hotel, or in any vessels containing the same or in the property designed for the sale of such liquor, the only way an issue may be raised on the order to show cause why the properties should not be forfeited to the state of New York is by answer, and an objection to a special motion to vacate and set aside the warrant, made by the corporate owner of the hotel property and its president and general manager, is well taken.

People v. *17 Cases of Paul Jones Whiskey*, 116 Misc Rep. 283, followed.

Where, however, the issues raised on the motion would doubtless be raised by answer and have to be tried, it is immaterial as a practical matter whether they are decided upon objections raised by a special appearance or at a trial.

Where all of the street numbers upon the hotel property ran from 7 to 17 inclusive, all of the building being used for hotel purposes, the search warrant, though it referred only to No. 9, the general entrance for patrons, gave a clear right to the officer to search the whole premises.

Section 801 of the Code of Criminal Procedure has nothing to do with the service of a search warrant issued pursuant to section 802-b of said Code, and an objection that the officer in serving the warrant did not comply with the former section is futile.

Where it is admitted that the officer making the search left a complete inventory of the property taken which can be

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identified as the receipt left by him, an objection that the inventory was not signed is untenable.

An objection that the search warrant was granted upon an affidavit and not upon a complaint is not valid where the same information is found in the affidavit, properly sworn to, that would be found in a complaint.

Motion to vacate and set aside the search warrant and for a return of the property seized denied, and, as the objections raised were in the nature of a demurrer, with leave to defendants to file an answer within the time limit stated in the stipulation heretofore entered into.

MOTION to vacate and set aside a search warrant issued pursuant to section 802-b of the Code of Criminal Procedure.

Charles J. Knoell, for R. S. Brown Hotel Company, Inc., and Ralph S. Brown, for motion.

Walter F. Hofheins, assistant district attorney (Guy B. Moore, district attorney), opposed.

NOONAN, J. For some time previous to May 5, 1921, the R. S. Brown Hotel Company, Inc., owned the hotel situated upon premises known as Nos. 7 to 17, inclusive, Delaware street, Tonawanda, N. Y., and also conducted said property as a hotel, Ralph S. Brown being president and general manager. On May 4, 1921, Joseph E. Holcomb, then a corporal of the New York state troopers, a peace officer, stationed at the city of Batavia, N. Y., purchased of the bartender of the said hotel company a half pint of intoxicating liquor, for which he paid the sum of two dollars. On May 5, 1921, said Holcomb applied to this court for a warrant to search premises known as 9 Delaware street in the city of Tonawanda, to wit, being a hotel operated by the Ralph S. Brown Company, Inc., and a warrant in the usual form was issued. Acting under the authority of this warrant the said Holcomb and other members of the state troopers searched the property of

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the Brown Hotel, located as above stated, and seized a large quantity of liquor.

In the search warrant notice was given to all persons claiming any right, title or interest in such liquors or any vessels containing same or in the property designed for the sale of such liquor to appear before the Erie county judge at Buffalo, N. Y., on the 19th day of May, 1921, at ten o'clock A. M., to show cause why such liquors and vessels containing the same and in the property designed for the sale of such liquor should not be forfeited to the state of New York.

Upon the return day the said hotel company and the said Ralph S. Brown appeared specially by attorney and moved to vacate the warrant. The district attorney's office opposed the motion on the ground that the only way an issue could be raised was by answer. In this regard I think the district attorney was correct (*People* v. *17 Cases of Paul Jones Whiskey,* 116 Misc. Rep. 283), and this court sustained the district attorney in his objections, and an order was made denying to the said hotel company and to said Ralph S. Brown the right to appear specially herein. From this order the said hotel company and the said Brown thereafter appealed to the Appellate Division, fourth department, but before anything had been done upon the appeal, a stipulation was entered into by the attorney for the hotel company and Brown and the district attorney, vacating said order and discontinuing the appeal, and they further stipulated that the objections and motions made upon the special appearance should be argued upon the merits before this court.

I am still of the opinion that the correct practice was to force the defendant to file an answer in order to raise the issues that he wished to have tried out, but as the issues raised on the motion would undoubt-

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edly be raised by answer and would have to be tried at some time, it is immaterial, as a practical matter, whether they are decided upon objections raised by special appearance or at the trial of the issues raised in the answer.

The statutory authority for seizure and forfeiture of liquor kept for unlawful traffic is found in section 802-b of the Code of Criminal Procedure, to which it was added by chapter 156 of the Laws of 1921. However, it is not a new law. It is a re-enactment, almost verbatim, of section 33 of the old Liquor Tax Law. It was part of the law of the state long before the Eighteenth Amendment to the Federal Constitution was seriously thought of.

In his very thorough brief upon the questions raised on the special appearance the attorney for the defendant lays great stress upon numerous federal authorities cited. To my mind these authorities are not controlling. The right to control the liquor traffic always came within the police power of the state and was never within the general police power of the federal government, until it acquired concurrent power with the states with the passage of the Eighteenth Amendment. Upon the passage of this amendment the states did not lose any of their police power over the regulation of the liquor traffic, except the right to pass statutes that are not in accord with the said amendment to the Federal Constitution, and the federal government acquired only concurrent and not exclusive jurisdiction in the enforcement of the laws relating to the liquor traffic. I think the trial courts of this state are still bound by the decisions of the appellate courts of this state in all cases where seizure of liquor is made under laws passed by the authority of the state of New York. *People* v. *Adams*, 176 N. Y. 351; *People* v. *McDonald*, 177 App. Div. 806.

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A proceeding under section 802-b is to be treated as a proceeding *in rem* and not as a criminal proceeding. *Clement* v. *Two Barrels of Whiskey, etc.*, 136 App. Div. 291; *Matter of Geschwinder*, 68 Misc. Rep. 97. If the evidence is uncontradicted the court may direct a verdict in favor of the complainant. *Clement* v. *Two Barrels of Whiskey, etc., supra.*

I think from the above authorities we must consider the case as civil in nature, and that it serves the same purpose in enabling the state to try the title to the property, which has been declared a nuisance by statute, and thus effect its forfeiture, as a replevin action affords means to try title to property between individuals.

In this action the state has to prove its case by a fair preponderance of the evidence and not beyond reasonable doubt. It is similar to other statutes that are passed in derogation of common-law rights and should be construed with reasonable strictness.

With the above observations in mind, we proceed to a discussion of the objections raised by the defendant on the special appearance.

The first point raised is that the warrant was granted upon an affidavit and not upon a complaint. I do not think this objection is valid. The same information is found in the affidavit that would be found in the complaint, and it is properly sworn to. It serves its purpose as a pleading just as well in one form as in the other.

The next point is that the affidavit does not state facts. In the affidavit Corporal Holcomb swears " he purchased half a pint of liquor for the sum of two dollars. Said intoxicating liquor was received by said deponent from above unknown person and was taken from beneath the bar of above premises by aforesaid person. Deponent verily believes intoxi-

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cating liquors are stored, kept, deposited and possessed in and upon said premises in violation of Section 1212 of the Penal Law of the State of New York." He also swears that the R. S. Brown Hotel Company, Inc., is the owner of the premises, and gives as the source of such information the assessment roll for taxing properties for the year 1921 in the assessors' office. The fact that the officer could buy liquor there was sufficient proof that it was kept for unlawful purposes. Incidently it might be mentioned that indictments founded upon said purchase by the officer were found against the man making the sale and the hotel company, or Brown as its manager, and pleas of guilty were entered upon indictments, and substantial fines imposed in each case.

The next point raised is that the warrant is too sweeping in its effect, in that it referred only to No. 9 Delaware street, while the officer searched the whole premises occupied by the R. S. Brown Hotel Company. I do not think this objection is sound. The street numbers upon the property in question run from 7 to 17 inclusive. I take it that No. 9 was the general entrance where the patrons of the hotel usually enter. All of the building was used for hotel purposes, and I think the warrant clearly gave right to the officer to search the whole premises.

The next point raised is that the affidavit is not sufficient because it does not state the name of the person keeping, storing or depositing the liquor for which search was made. In that respect the affidavit states the person was John Doe, whose name is not known to deponent, and that the R. S. Brown Hotel Company, Inc., was the owner of the premises. I think this is sufficient.

The next point raised is that the officer in serving the warrant did not comply with some provision of

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section 801 of the Code of Criminal Procedure. I do not think that this section has anything to do with the service of the warrant under section 802-b. I think rather that it refers to the service of the warrant provided for under section 792 of the Code of Criminal Procedure. The search warrants are entirely different in character. That one issued under section 792 of the Code of Criminal Procedure is general in its application and criminal in character (*People ex rel. Simpson Co.* v. *Kempner*, 208 N. Y. 16), while section 802-b is civil in character, as above stated, and is passed for one specific purpose. It contains within itself a nearly complete system of practice for effecting the purpose for which it was designed, and I think the only sections of the Code of Criminal Procedure which in any way have a bearing upon section 802-b are those that follow it in title 2.

The next point raised is that the officer making the search took the property but did not give a receipt for the property taken. It is admitted that the officers making the search left a complete inventory of the property taken, but that it was not signed. It would have been better practice on the part of the officers to have signed it, but as long as it can be identified as the receipt left by the officers making the search its purpose of protecting the rights of the owners of the property seized by giving them a list of the property taken is effected, and the objection raised to the receipt because it was not signed is not tenable.

After a careful consideration of the whole case, I do not feel that any of the substantial rights of the parties interested have been violated. There was ample reason for believing that the law was being violated upon the premises, as shown by the fact that the officer purchased intoxicating liquor easily with-

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out any questions being asked. The search was made under a warrant duly issued, and in an orderly manner, and an inventory of the property taken by the officers was left upon the premises with the proper person.

If my conclusions are right, it follows that the motion to vacate the warrant and for the return of the property seized must be denied, and an order may be entered accordingly.

As the objections raised were in the nature of a demurrer, as it existed under our former civil practice, the defendants should be allowed ten days to file an answer raising the issues they wish to have determined upon the trial of the action, and, as provided in the stipulation heretofore entered into, the answer should be filed within ten days after service of the order upon the attorney for the defendants.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* WILLIAM WICKA, Defendant.

(County Court, Erie County, December, 1921.)

Criminal procedure — search warrant — indictment — police power —intoxicating liquors — failure to post copy of warrant upon premises immaterial as to defendant who was personally served — evidence — motion to dismiss indictment denied.

The use of a search warrant to prevent and detect crime is a valid exercise of the police power of the state.

Section 802-b of the Code of Criminal Procedure, added by chapter 156 of the Laws of 1921, is almost a verbatim re-enactment of section 33 of the Liquor Tax Law (Laws of 1909, chap. 39) and no exact or complete rule governs the service of a warrant issued pursuant thereto.

There being no direction in section 802-b of the Code of Criminal Procedure as to when the posting of a copy of a

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search warrant issued thereunder shall be done, an orderly procedure would be the service of the warrant upon the owner or person in charge, the search for and seizure of the liquors, if any are found, making an inventory thereof, giving a receipt for the property and posting a copy of the warrant.

As the posting of a copy of the warrant is to give constructive notice to anyone having an interest in the liquor seized or its container who was not present when the seizure was made, the exact time of posting is immaterial provided it is done before the officer leaves the premises searched.

Upon and for the purposes of a motion by defendant to vacate and set aside a search warrant issued pursuant to section 802-b of the Code of Criminal Procedure and to dismiss an indictment against him for having unlawfully in his possession cider containing more than one-half of one per cent of alcohol by volume, it was conceded that the information upon which the warrant was issued was sufficient, that the warrant was regular upon its face and that a copy thereof was duly served upon defendant but that no copy of the warrant was posted upon the premises as required by section 802-b of the Code of Criminal Procedure. *Held*, that defendant had no cause for complaint because of the failure to post the copy of the warrant upon the premises, and his motion to dismiss the indictment will be denied and the liquor seized or so much thereof as is needed for use as evidence may be retained by the proper officials until the trial under the indictment is finally ended, at which time the liquor seized, except such as was properly used for evidence, will be returned to defendant.

MOTION to set aside a search warrant and to dismiss indictment.

Walter F. Hofheins, assistant district attorney (Guy B. Moore, district attorney), for People.

George B. Doyle, for defendant.

NOONAN, J. The defendant has been indicted for violating section 1212, subdivision 2, of the Penal Law, unlawfully possessing cider containing more than one-

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half of one per cent of alcohol by volume. The sole evidence to sustain the indictment was procured as follows: On July 21, 1921, a search warrant was issued by me under the provisions of section 802-b of the Code of Criminal Procedure. For the purpose of this motion it is conceded that the information for the warrant was sufficient; that the warrant was regular on its face; that a copy was duly served upon the defendant when the search was made on July 22, 1921, but that no copy of the warrant was posted upon the premises as required by this section. The counsel for defendant contends that the failure to post a copy of the warrant upon the premises was jurisdictional, and renders the whole proceeding void *ab initio;* that the evidence so obtained is illegal and consequently the indictment founded thereon is a nullity. The counsel for the people urges that as the proceedings under the search warrant were apparently regular up to the failure to post a copy of it on the premises the evidence secured before that time was properly obtained and is sufficient to sustain the indictment.

Section 802-b was added to the Code of Criminal Procedure by chapter 156 of the Laws of 1921. It is a re-enactment, almost verbatim, of section 33 of the Liquor Tax Law (Laws of 1909, chap. 39). No exact or complete rule governing the service of the warrant is provided. The only direction is: "A copy of such warrant shall be delivered to the person so keeping such liquor, if he be present at the time of such seizure, and if he be not present, then to the person, if any, apparently in possession of such liquor or of the premises wherein the same are found, and *another* copy of such warrant shall be posted in a conspicuous place upon said premises." There are no directions as to *when* the posting must be done. An orderly procedure would be the service of the warrant upon the

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owner or person in charge; the search for, and the seizure of the liquors, if any are found, making an inventory, giving a receipt for the property and posting a copy of the warrant.

As the posting of a copy of the warrant is to give constructive notice of the seizure to anyone not present when the seizure was made and having any interest in the liquor seized or its container (*Matter of Ingalls,* 77 Misc. Rep. 447; *Matter of Liquors,* 189 App. Div. 109), the exact time of posting is not material provided it is done before the officer leaves the premises searched.

The defendant also urges that his rights under the Fourth and Fifth Amendments to the United States Constitution and under section 8 of the Civil Rights Law of this state have been violated, but the cases cited do not support his claim. In all of them there was either no search warrant, or the property seized was not covered by the warrant. And further, the Fourth Amendment, prohibiting illegal seizures, does not apply to the states. Its full function is to limit the powers of the general government. *People* v. *Adams,* 176 N. Y. 351; *People* v. *McDonald,* 177 App. Div. 808, citing *Fox* v. *State of Ohio,* 5 How. (U. S.) 410; *Twining* v. *New Jersey,* 211 U. S. 78. The claim of the defendant that his rights under the Fifth Amendment and under section 8 of the Civil Rights Law have been violated is not valid. He has been indicted by a duly constituted grand jury, and the search warrant, for the purposes of this decision, is regular and duly issued upon probable cause.

The vital question seems to be whether or not the liquors seized under a valid search warrant, duly issued upon probable cause, can be used as evidence to sustain an indictment, and then again in court upon the trial, when the proceedings, under the search

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warrant, for the seizure and forfeiture of the liquors, fails because of the neglect of the officers to properly perform some ministerial act. I think the liquor can be used, and for several reasons.

"The court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers *or other articles of personal property,* which are material and properly offered in evidence." *People* v. *Adams,* 176 N. Y. 351, 358. This is a very carefully considered case. Many authorities are cited to support this unanimous ruling of the Court of Appeals, and the case is followed in *People* v. *McDonald,* 177 App. Div. 806, which is another carefully considered case backed by a unanimous court.

Counsel for defendant urges that certain decisions of the federal courts, which he has cited, are controlling. With this position I am unable to agree. Before the passage of the Eighteenth Amendment, the state alone had control of the liquor traffic within its boundaries, under its police power. It did not surrender any of its control under the amendment, except the power to pass legislation hostile to it. The federal government acquired concurrent and not exclusive jurisdiction. This change imposes no obligation upon trial judges in this state to be bound by the federal court decisions. Such decisions apply only to seizures made under federal authority. *People* v. *McDonald,* 177 App. Div. 808, and cases there cited; *People* v. *Adams,* 176 N. Y. 351. In this case the seizure was made by officers who derived their authority from the laws of the state of New York. It is the courts of the state of New York which authoritatively construe the laws of this state. The decision of the Court of Appeals is the law of this court. *People* v. *McDonald, supra.* If any of the rights of the defend-

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ant have been violated the remedy is to punish the wrong and not change the law of evidence. *People* v. *McDonald, supra.* I have not been able to find any subsequent decisions that weaken the authority of *People* v. *Adams*, and *People* v. *McDonald, supra.*

In deciding the vital question before us, we may properly consider to what extent a search warrant may be used in detecting and preventing crime. Generally its use to prevent and detect crime is a valid exercise of the police power of the state. 24 R. C. L. 716; *Clement* v. *May*, 136 App. Div. 199; *Clement* v. *Two Barrels, etc.*, 136 id. 291; *Farley* v. *Liquors Seized*, 80 Misc. Rep. 32; *People ex rel. Simpson Co.* v. *Kempner*, 208 N. Y. 16.

The procedure for preventing and detecting crime (Code Crim. Pro. § 792) differs in some material ways from the procedure for search for seizure and forfeiture of intoxicating liquors kept for unlawful traffic. Code Crim. Pro. § 802-b. The first is general in its application, criminal rather than civil in character, and the title to the property seized cannot be determined in the proceeding but must be decided in a civil action (*People ex rel. Simpson Co.* v. *Kempner*, 208 N. Y. 16) and it does not require service of a copy of the warrant upon anyone, while the second is limited solely to the search for, seizure and forfeiture of intoxicating liquor kept for unlawful purposes; it is a proceeding *in rem*, civil rather than criminal (*Clement* v. *Two Barrels, etc.*, 136 App. Div. 291; *Matter of Geschwinder*, 68 Misc. Rep. 97), and, if the evidence is uncontradicted, the court may direct a verdict in favor of the complainant. *Clement* v. *Two Barrels, etc., supra.* The section provides its own practice. The warrant gives notice of the time and place where the interested parties may show cause why the liquor seized should not be forfeited.

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A copy of the warrant must be delivered to the person keeping such liquor, if present, and if not present, then to the person, if any, apparently in possession of such liquor or of the premises where the liquor is found, and another copy must be posted in a conspicuous place upon the premises. Upon the return day the interested parties assert their rights, if any, by *answer*. *People* v. *17 Cases, etc.*, 116 Misc. Rep. 283. The information and warrant serve as the complaint for the people, and the issues raised by the answer are tried as a *civil* cause. In short nearly the whole procedure for forfeiture of liquor is found in this section. Under its provisions the title to property forfeited because it is a nuisance is tried and determined the same as a disputed title to any property is tried in a replevin action between individuals.

Since the posting of the copy of the warrant upon the premises is to give constructive notice to any one having an interest in the property seized but who was not present when the seizure was made (*Matter of Ingalls*, 77 Misc. Rep. 447; *Matter of Liquors*, 189 App. Div. 109) the posting serves no useful purpose when the actual owner was present when the search was made, or who has received a copy from the person in charge and upon whom it had been served. The posting is provided as an added protection to those who *might* have some right in the property seized, so that he may protect his interest in a property right, hence my conclusion is that any liquor, seized under a valid search warrant duly issued upon proper information may be used in evidence against the owner or possessor thereof *unless* there was such a failure in the service of the warrant as would effect a substantial right of the defendant. To hold otherwise would be sacrificing substance to form. In the case at bar no substantial right of the defendant was

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effected, as is evidenced by the fact that he is appearing in a court where the real question of whether or not the liquor was possessed for unlawful purpose may be properly determined. The fact that the state has deemed it expedient not to declare a forfeiture without giving constructive notice of the time and place of the hearing to anyone who *might* have an interest in the property seized, is no reason why the liquor taken from its owner should not be used as evidence against him provided, as in this case, he, or the person in charge, has received a copy of the warrant.

If I am right in my conclusions, it follows that the motion to dismiss the indictment must be denied; that the proper officials may retain the liquor seized, or so much thereof as is necessary, for evidence, until the action under the indictment is finally ended, at which time the liquor seized, except such as was properly used for evidence, shall be returned to defendant, and an order may be entered accordingly.

Ordered accordingly.

In the Matter of the Petition of GEORGE MERCER and CHARLES COLEMAN MILLER to Render and Settle Their Account as Executors of and Trustees under the Last Will and Testament of WARREN SNYDER, Deceased.

(Surrogate's Court, Kings County, December, 1921.)

Decedents' estates — banks and banking — dividends on savings bank deposits accruing subsequent to owner's death not principal but income.

Dividends derived from the earnings of a savings bank which did not accrue to decedent in his lifetime form no part of the principal of his estate but are payable as income to the legatees of income.

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SETTLEMENT of executors' accounts.

Charles Coleman Miller, for petitioners, George Mercer and Charles Coleman Miller.

Edward J. Flanagan, special guardian, for William Van Voorhees, William Grant and Betty Warren MacMillan.

WINGATE, S. The decedent died June 27, 1919, a depositor in fourteen savings banks. On July 1, 1919, dividends were credited to the accounts standing in his name. The sums thus credited, though commonly so called, are not interest — which is compensation paid by a borrower of money to the lender for its use — and are not apportionable between principal and income. They are dividends derived from earnings, and are payable to the depositor only if declared by the trustees of the banks, and then only if the deposits are not withdrawn prior to the close of the period for which they are declared. In the case at bar this period closed June 30, 1919.

The right to participate in these dividend distributions did not accrue to the decedent in his lifetime, and when credited or paid after his death they form no part of the principal of his estate. They are the product or produce of his estate, arising during its administration, and are payable as income to those to whom by his will the testator bequeathed the income of the property of which he died possessed.

Settle decree accordingly.

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In the Matter of the Application of JAMES W. FLEMING, Individually and as Mayor of the City of Troy, and of the CITY OF TROY, a Domestic Municipal Corporation, for Alternative Prohibition Order Commanding the Public Service Commission of the State of New York and the United Traction Company and Each of Them to Desist and Refrain from any Further Proceeding in the Matter of the Application of the United Traction Company for Permission to Increase its Rate of Fare in the City of Troy to the Sum of Eight Cents, as Prayed For in a Petition Filed by Said United Traction Company with the Public Service Commission on or About the 10th Day of November, 1921.

(Supreme Court, Albany Special Term, December, 1921.)

Street railways — fare — municipal corporations — franchise — legislative authority — legislature has full power to determine conditions local authorities may attach to railroad consents — rate of fare subject to regulation by legislature — city of Troy — public service commission has jurisdiction to fix rates, notwithstanding franchise agreement — writ of prohibition denied — Public Service Commissions Law, as amended by Laws of 1921, chap. 335.

While a city although having no constitutional authority to prescribe the rate of fare may impose as a condition to the giving of its consent to the operation of a street railway within the corporate limits that a stipulated rate of fare shall be charged, the legislature has full power to determine the conditions that local authorities may attach to railroad consents to be given in the future.

The state's right to regulate fare, which necessarily includes the power to increase the same, if inadequate, is an implied part of any contract for the operation of a railway upon the streets of a city and the rate of fare provisionally fixed by such a contract is subject to regulation by the legislature.

Where, therefore, the United Traction Company, the successor

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in interest of several street railroads formerly operating under franchises created by the city of Troy on August 5, 1890, and at various times thereafter down to November, 1895, upon consents which provided that the rate of fare to be collected should not exceed the sum of five cents, made an application to the public service commission, which under the statute (Public Service Commissions Law, as amended by chapter 335 of the Laws of 1921), has full jurisdiction to fix reasonable rates "notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statutes, contract, grant, franchise condition, consent or other agreement," for permission to increase its rate of fare within the city to the sum of eight cents, an application on the part of the city for a writ of prohibition commanding the public service commission and the railway company to refrain from proceeding on such application for an increase of fare will be denied, on the ground that there being no question involved as to the annulment of a condition, the abrogation of a defeasance or impairment of an obligation, the commission has both jurisdiction and power to grant the particular relief asked for, so far as the local franchises are concerned.

APPLICATION for writ of prohibition.

Thomas H. Guy, corporation counsel, for applicant.

Ledyard P. Hale, for Public Service Commission.

John E. MacLean, for United Traction Company.

HINMAN, J. This is an application on the part of the city of Troy for a writ of prohibition commanding the public service commission and the United Traction Company to refrain from further proceedings in the matter of the application of said company for permission to increase its rate of fare within the city of Troy to the sum of eight cents.

There may be question as to whether prohibition will lie but all parties have expressly stated their desire to have the matter disposed of upon the merits of the constitutional question involved.

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The United Traction Company is the successor of several street surface railroads formerly operating upon the streets of the city of Troy under so-called franchise agreements with said city. The United Traction Company has succeeded to all their rights and obligations under said agreements. These agreements were consents of the city to use certain streets of the city for the construction and operation of the several railroads, which consents embodied certain terms and conditions which were agreed to by the railroads. These consents were obtained at various times between August 5, 1890, and November 25, 1895. The consents of August 5, 1890, contain the following provision as to the rate of fare that may be collected:

"Section 4. The rate of fare to be collected for a ride in any one general direction upon the railroad of said company within the City of Troy shall not exceed the sum of five cents."

This fare limitation has been incorporated either expressly or by reference in other consents. The Constitution of the state says that "no law shall authorize the construction or operation of a street railroad" unless the consent "of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained." Const., art. III, § 18. The Constitution does not in any way prescribe or limit the fare to be charged by a street railway company nor does it delegate any power in relation thereto to the municipality. There is a limitation of the legislative power in one respect only. The consent of the municipality must be obtained before a law can authorize construction or operation on any of its streets. Like consent was required by statute prior to 1875 when the provision therefor was inserted in the Constitution. The effect of placing it in the Con-

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stitution was to prevent the legislature from passing a law without providing for such consent.

While the city has no constitutional authority to prescribe the rate of fare, the courts have repeatedly held that a city could impose as a condition to giving consent that a stipulated rate of fare should be charged. *Matter of Quinby* v. *Public Service Comm.*, 223 N. Y. 244, 259. In such cases, however, the courts were dealing only with the question of the power of the local authorities over the corporation and not with the power of the local authorities to impose terms which would take from the legislature its regulatory or police power to fix fares. Id.

It is expressly held by the Court of Appeals that there is full power in the legislature to determine the conditions that the local authorities may attach to the railroad consents to be given in the future. *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, 360. It has been the annulment of a condition attached to a railroad consent granted prior to such legislative action which the Court of Appeals has refused to pass upon. Id. A doubt has been expressed as to whether and in what cases the legislature may wipe out the condition altogether and "transform a consent that was qualified into one that is absolute." *Matter of International Ry. Co.* v. *Public Service Comm.*, 226 N. Y. 474, 482. That question has been left open, except that certain of the judges of that court have individually expressed the opinion that contracts cannot be made which in any way limit the right of the state, by virtue of its police power, to regulate rates of fare, and to modify rates fixed in a local franchise. Attention has been called to that fact in *Matter of McAneny*, 198 App. Div. 205, in a case involving the question of legislative power by retroactive legislation to modify rates fixed in local fran-

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chises, and the Appellate Division in the first department has sustained the power of the legislature, holding that a majority of the judges of the Court of Appeals had so plainly intimated their views as to leave the question settled beyond reasonable doubt.

I presume that this court at Special Term is bound by that decision but since the Court of Appeals in its prevailing opinions has so carefully limited its rulings to the necessities of each case so as to avoid the decision of the question involved here, it has occurred to me that it would be helpful to apply to the particular facts of this case the principles which have been well settled by the Court of Appeals in cases of this character.

In *Matter of Thirty-fourth St. R. R. Co.*, 102 N. Y. 343, the limits of the constitutional authority of municipalities under article III, section 18 of the Constitution were considered and it was there said: "But the Constitution, neither by express language nor by implication abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate, that except as restrained by the Constitution, the legislative power is untrammeled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control." P. 350.

This principle has been repeatedly sustained and the Court of Appeals has directly applied it in a very recent gas company case. *Public Service Comm. v. Pavilion Natural Gas Co.*, 232 N. Y. 146. The question was whether a gas company could increase the maximum rates fixed in local fran-

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chises and agreements by simply filing a schedule of rates with the public service commission pursuant to legislative authority therefor, under subdivision 12 of section 66 of the Public Service Commissions Law (Laws of 1910, chap. 480). The court had already held, as to similar local franchises (*Town of North Hempstead* v. *Public Service Corp. of L. I.*, 231 N. Y. 447) that by implication the statute became a part of the terms of consent and that the gas company on complying with the statute was empowered to abrogate the rates stipulated in the franchises or agreements and to put into operation a new schedule of just and reasonable rates. That case settled the right to do so as to all franchises and agreements given or entered into subseqent to the time when the statute became effective.

The right to increase the maximum rates specified in franchises and agreements made prior to the passage of such statute was decided in the *Pavilion Natural Gas Co. Case, supra.* The court held that the same rule applied to them, saying: "There was implied in all such franchises or agreements, and coupled with the terms thereof, a provision that the legislature, in the exercise of its powers, might thereafter, either itself, or acting through another, regulate the rates thus fixed, and increase or lower them." P. 150.

Also, in *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, the Court of Appeals held that statutes existing at the time of granting railroad consents are read into the contract. The court said: "They enter by implication into its terms. They do not change the obligation. They make it what it is. * * * The commission is now holding the city to terms which were accepted by implication when the conditions were imposed."

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The local franchises granted by the city of Troy, involved here, were created on August 5, 1890, and at various times thereafter down to November, 1895. Prior to the granting of any of these franchises the legislature had entered the field and itself expressly prescribed the maximum rate of fare at five cents. General Street Railway Law; Laws of 1884, chapter 252. In May of 1890, by chapter 565 of the laws of that year, effective May 1, 1891, the legislature passed another railroad law and served express notice upon the local authorities and all railway corporations that "The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter [Laws of 1884, chap. 252, *supra*] or under the provisions of this article" (article on street railroads). Laws of 1890, chap. 565, § 101. This section 101 of the Railroad Law of 1890 became section 181 of the revised Railroad Law of 1910, and is still the law.

The power to "regulate" fares necessarily includes the power to increase the same if inadequate just as truly as it includes the power to reduce them if excessive. *Matter of City of Niagara Falls* v. *Public Service Comm.*, 229 N. Y. 333, 350; *Matter of International Ry. Co.* v. *Public Service Comm.*, 226 id. 474, 479. The words "to regulate and reduce," as used in section 101 of the statute of 1890, are not entirely apt, but the section read as a whole is susceptible of no other natural interpretation than that the legislature has, for greater certainty, expressly included the reservation of its rights to "reduce" a rate of fare. See *Matter of Quinby, etc.*, 223 N. Y. 244, 258, construing § 49, subd. 1 of the Public Service Comm. Law, and *People ex rel. Village of South Glens Falls* v.

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Public Service Comm., 225 id. 216, construing § 66, subd. 5 of the same law.

Under the decisions in the *Pavilion Natural Gas Case, supra,* and *People ex rel. City of New York* v. *Nixon, supra,* by implication the statute of 1890 became a part of the terms of subsequent consents and as to all consents granted prior thereto "* * * there was implied * * * and coupled with the terms thereof, a provision that the legislature, in the exercise of its powers, might thereafter, either itself, or acting through another, regulate the rates thus fixed, and increase or lower them."

Section 101 of the statute of 1890 was actually in force when most of the consents involved here were granted. Three of them, however, were granted in August and September of 1890, several months after the statute of 1890 was passed. While not effective as an operating statute until the following May, the local authorities and the company were bound to take notice of the fact that the law had been passed and that the legislature had served notice of its right to regulate the rate of fare on any railroad whether constructed and operated under the act of 1884 or the act of 1890. Thus the constitutional power of the legislature, untrammeled and supreme in the matter of rate-making, was openly revealed by decisions and statute prior to the granting of any of the franchises in question here. This is of importance at least in determining the intention, express or implied, of the parties at the time the consents were given. It would require clear, definite and unambiguous language in a consent thereafter granted to indicate any intention to defeat the reserved and implied power of the legislature to regulate the fare, assuming for the sake of argument that it could be defeated by attaching to the consent an obligation in the nature of a defeasance

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or condition subsequent, working a forfeiture or revocation of the grant. The jurisdiction of the state cannot be reduced by implication. *Matter of Quinby* v. *Public Service Comm.*, 223 N. Y. 244, 259. It has been repeatedly held that "* * * power to establish rates is not essential to the consent of local authorities and will not be implied and that the legislature is at all times supreme in the matter." *Matter of Quinby, supra*, 261, and cases cited. "Every doubt must be resolved in favor of the continuance of the power in the State." *People ex rel. Glens Falls* v. *Public Service Comm.*, 225 N. Y. 216, 225. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356, 359.

In a case recently decided in the United States Supreme Court (*San Antonio* v. *San Antonio Public Service Co.*, 255 U. S. 547) it was held that a maximum fare limitation in a street railway franchise, granted by a city which was vested with the rate regulating power and forbidden to restrict it by contract, should be taken as in exercise of the regulating power and not as imposing a unilateral contract or condition upon the grantee to observe the limitation even though it become confiscatory, and especially so where the case exhibits no actual intention of the parties to bind the grantee and not the city.

Chief Justice White, delivering the opinion of the court in that case, reveals the error underlying the argument advanced that there was a condition binding upon the grantee even though the power of government was wholly uncontrolled by contract. Speaking of the suggestion made in argument, that although no contract was possible under the constitutional restric-

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tion which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate, Chief Justice White said that the proposition was irrelevant to the case being considered, since there was not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. Continuing, he said: "But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power."

In the case at bar, the city of Troy and the railroad agreed by implication of fundamental and existing law that the legislature had the right to regulate the rate of fare; and without any words of defeasance expressing an intention of the parties that there should be a forfeiture or revocation of the consent in

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the event that the regulatory power of government should fix a rate of fare above the maximum rate fixed in the consent, the express agreement was that "the rate of fare to be collected * * * shall not exceed the sum of five cents." The legislature and the city were wholly uncontrolled by contract. By implication the city agreed to abide by the action of the legislature under its reserved regulatory power and in the portion of the agreement expressed, it did not fix an absolute rate of five cents, which the city would be bound not to lower, even as between the city and the corporation. It simply provided that the rate "shall not exceed the sum of five cents." Assuming that the city might have said, agreeably to the corporation, that it gave its consent only for the purpose of getting cheap transportation, namely, not to exceed a five cent fare, and that it annexed to the consent a condition subsequent revoking its consent whenever the rate should be fixed higher than that sum, it is plain that there was no such attempt on the part of the parties to produce such a condition. It is equally plain that both parties contracted with reference to the settled law when they acted, which was notice to the city that franchises thereafter granted must be coupled with no conditions inconsistent with the power of the legislature expressly or impliedly reserved and that "* * * Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power." *San Antonio* v. *San Antonio Public Service Comm., supra,* 556. The state is not now seeking to change the obligation of the city's contract with the company. The public service commission, acting under express authority, "* * * is now holding the city to terms which were accepted by implication when the conditions were imposed. This

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is not to 'transform a consent that was qualified into one that is absolute' as the result of retroactive legislation." *People ex rel. City of New York* v. *Nixon, supra,* 361.

Judge Cardozo, writing for the Court of Appeals in *Matter of International Ry. Co.* v. *Pub. Service Comm.,* 226 N. Y. 474, 482, explains the decision of that court in the *Quinby Case,* 223 N. Y. 244, and says: "We saw that the effect of the annulment would be to abrogate a defeasance, * * *." The same learned judge, again speaking of the *Quinby* case in *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356, says at page 360: "It was the 'annulment' of a condition already imposed, the 'abrogation of a defeasance' already attached, the impairment of an obligation already created. * * *, which we refused to bring within the jurisdiction of the commission through words of doubtful import." The single point decided, however, was "one of statutory construction." *Niagara Falls Case, supra,* 340. It was held that the legislature had not conferred jurisdiction upon the commission, whatever power it might have to do so.

Section 49, subdivision 1, of the Public Service Commissions Law was amended by Laws of 1921, chapter 335, by which amendment the commission was given full jurisdiction to fix reasonable rates "* * * notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statute, contract, grant, franchise, condition, consent or other agreement * * *." The question is no longer an open one as to whether the commission has the requisite jurisdiction. The legislature by amendment has said it has. The only question left apparently is the power of the legislature to permit the commission to annul a condition already imposed, to abrogate a defeasance already attached, to impair an

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obligation already created. In this Troy case before me, there is no question of the annulment of a condition, no abrogation of a defeasance, no impairment of an obligation involved. The state's right to regulate the fare became an implied part of the contract and in construing the terms of that contract, the only natural interpretation to give to it is that the rate was fixed provisionally, subject to regulation by the legislature. Amendment by legislation was within the contemplation of the parties.

Thus in the case at bar the commission has jurisdiction and has the power to grant the particular relief prayed for in the application made to it by the United Traction Company so far as the local franchises received from the city of Troy are concerned.

It follows that the application for a writ of prohibition should be denied.

Ordered accordingly.

SAMUEL MOSS, Plaintiff, *v.* SOLOMON RUBENSTEIN, Defendant.

(Supreme Court, Bronx Special Term, December, 1921.)

Vendor and purchaser—title—specific performance—maintaining garage in city of New York in which vehicles are stored for hire, in violation of building zone resolution, held not to constitute an incumbrance — notice from fire department — deduction from purchase price refused — complaint dismissed.

Where a contract for the sale of premises subject to building restrictions and regulations, etc., provided that all notices of violations of law or municipal ordinances noted in or issued by the fire department of the city of New York against or affecting the premises at the date of the contract, shall be complied with by the seller, and the premises conveyed free of the same, an order of the fire department, since complied with,

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served upon the seller to discontinue the maintenance of a garage in which were kept motor vehicles which are subject to charges for storage in violation of a duly adopted zoning resolution, which violation had its inception before and had continued since the date of contract of sale, creates no incumbrance upon the title, the situation being covered by the express terms of the contract, but even if this were not so, the zoning resolution did not constitute such an incumbrance.

Where in an action in equity to procure a judgment for an abatement upon the purchase price of the premises by reason of the alleged defect in title, or in the event that it be adjudged that defendant cannot convey a good title, that plaintiff have judgment for the amount of his deposit on the purchase price with interest, the answer, which was practically a general denial, alleges that the only reason why plaintiff refused to accept the deed tendered by defendant and offered to pay the balance of the purchase price, was said order of the fire department and it is apparent that in any aspect that can be taken of the case, plaintiff is not entitled to an abatement from the purchase price on account of loss of income he expected to get from the premises and it is clear that plaintiff and not defendant had failed to comply with the terms of the contract, he cannot recover back the money paid thereon, and defendant is entitled to judgment dismissing the complaint upon the merits with costs.

ACTION in equity to procure a judgment for an abatement on the purchase price of real property by reason of an alleged defect in the title and that upon payment of the residue of the purchase money the defendant be directed to specifically perform the agreement, or should the court adjudge that the defendant cannot convey a good title that the plaintiff have a money judgment for $1,000 paid as a deposit on the said purchase price with interest and for costs and expenses of examination of title and damages.

Samuel Koffler, for plaintiff.

Ernest J. Magan, for defendant.

GIEGERICH, J. The complaint alleges the making of a contract by the plaintiff with the defendant on April

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29, 1921, for the purchase of the premises known by the street number 1690 Nelson avenue, in the borough of The Bronx, New York city, for $10,000, free of any "liens or attendances or violations" of the fire or other departments having jurisdiction "against or affecting the premises at the date hereof;" the payment of $1,000 on account of the purchase price; that the plaintiff is ready and willing to pay the residue of the purchase price for a "good and marketable title of said premises and a proper deed of the fee thereof, free from all incumbrances, according to the contract;" the tender of the residue of the purchase money, and that the defendant has refused and still refuses to deliver a conveyance of said premises in accordance with the provisions of the said agreement; that defendant's title is "encumbered by a violation of the fire department of the city of New York," and "that by even taking off the said violation the said plaintiff will, as a result of the said violation being taken off, lose an income of three hundred and sixty ($360) dollars per annum;" that the contract would not have been entered into were it not based on the fact that the plaintiff would receive an income from certain garages on said premises in the sum of at least $360 per year, "which the fire department now seeks to make impossible for said garage to remain on the said premises, and the said fire department considers it a violation of the law to have such a garage on the premises;" that plaintiff in good faith has spent $75 in searching the title to said premises, and that if defendant is unable to make good title of said premises the plaintiff will thereby be damaged to the extent of $5,000. The prayer for relief is (1) that a just reduction be made from the purchase price because the property will be worth at least $5,000 less than if the defendant were able to deliver a deed permitting

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the plaintiff to have on the said premises the said garage, and that on payment by the plaintiff of the residue of said purchase money defendant be decreed to specifically perform said agreement, and (2) if he cannot make good title that the defendant be adjudged to pay to the plaintiff his $1,000 deposit, with interest, together with plaintiff's expenses made and incurred under the agreement, and also $5,000 damages, and that such sums and the costs of this action be declared a lien on said premises, and said lien be foreclosed by a sale thereof, and that plaintiff have judgment for any deficiency. The answer is substantially a general denial, except that it admits ownership and the execution of the agreement, and alleges that the only reason the plaintiff refused to accept the deed offered by the defendant and to pay the balance of the purchase price was a certain order of the fire department issued May 10, 1921, directing the use of the garage referred to in the complaint, subject to charge for storage, be discontinued as violative of the restrictions imposed by the Building Zone Law, and that the defendant gave the plaintiff notice to complete the purchase on August 5, 1921, at ten A. M., or be deemed in default, and that the plaintiff refused to perform. The contract entered into between the parties contains, among other provisions, the following: "Said premises are sold subject to building restrictions and regulations in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York July 25, 1916, and amendments and additions thereto now in force," and "all notes or notices of violation of law or municipal ordinances * * * noted in or issued by the * * * fire department * * * against or affecting the premises at the date hereof shall be complied with by the seller, and the premises

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shall be conveyed free of the same." On May 10, 1921, the fire department of the city of New York served an order on the defendant to "discontinue the maintenance of garage in which is kept motor vehicles that are subject to charges for storage on these premises." The notice continues: "Explanation: This order is issued for the reason that the maintenance of the use or occupancy referred to above is a violation of the building zone resolution adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, premises affected by this order being located in a portion of the city designated by said resolution as a residence district." The building zone resolution referred to in the foregoing order restricts only the use of the garage on the premises "subject to charges for storage;" that is, for renting purposes; and it does not prohibit or restrict the use beyond that. This order has since been complied with. The plaintiff claims that "defendant's title is encumbered by a violation of the Fire Department of the City of New York," and that even if the violation is removed plaintiff will lose an income of $360 per year he expected to get from the premises in question. I cannot agree with plaintiff's view that the order served by the fire department creates an encumbrance on the defendant's title. That order simply ordered the discontinuance of a violation of the so-called zoning resolution which had evidently continued for some time, and which certainly had its inception before and had continued since April 29, 1921, the day on which the contract of sale was entered into. This very situation is covered by the express provision of the contract above set forth relative to the said premises being sold subject to building restrictions and regulations of the so-called zoning resolution. Even if this were not the case the so-called zoning resolution does

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not constitute an incumbrance upon the premises in suit. *Lincoln Trust Co.* v. *Williams Building Corp.*, 229 N. Y. 313. I do not agree with plaintiff's contention that because he will not receive an income of $360 per year which he says he expected to get from the garages on the premises he is entitled to equitable relief diminishing the purchase price and decreeing specific performance on that basis. It should perhaps be observed in this connection that there is no evidence in this case that the defendant, for the purpose of inducing the plaintiff to enter into the contract in suit, made any representations to him that the garages could be used for the storage of motor vehicles that are subject to charges for storage or that any income might be derived from the renting of such garages to the public for such a purpose, or that there was any understanding between the parties as to the purposes for which the property was bought by the plaintiff, or the use he might make of any part thereof, or as to any income, if any, which might be derived from the renting of the garages to the public for the storage of motor vehicles that are subject to charge for storage. The complaint alleges: "*Seventh*, That the contract above referred to would not have been entered into between the plaintiff and the defendant were it not based on the fact that the plaintiff would receive an income from certain garages on the said premises in the sum of at least three hundred and sixty ($360) dollars per year, which the fire department now seeks to make impossible for said garage to remain on the said premises and the said fire department considers it a violation of the law to have such a garage on the premises." According to the plaintiff's brief all that he claims is "that the agreement referred to would not have been entered into were it not made in contemplation that the premises could be

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used for garage purposes and the purchaser would receive therefrom an income of at least three hundred and sixty ($360) dollars per year, and that the violation filed against said premises by the fire department now makes it unlawful and therefore impossible to use the premises for such garage purposes." Such allegations and statements fall far short of showing that the defendant knew that the plaintiff entered into the contract for the purpose of renting the garages to the public, and the plaintiff's requested finding of fact that the contract was entered into by him "with the intent and contemplation to continue to use the property for garage purposes, subject to the charge for storage and such use and which was well known to defendant," has been refused because there is no evidence to support it. In the absence of proof of either of the necessary facts above referred to there is no valid ground upon which a claim for a deduction or abatement can be sustained. Moreover, the defendant tendered a deed for the very property he contracted to convey, and in strict compliance with the terms of his contract with the plaintiff, but the latter refused to complete the transaction according to the contract and demanded a reduction in the amount of the purchase price. The rule applicable to a claim for a deduction or abatement from the purchase price because of an alleged defect in the vendor's title is stated with great clearness by Mr. Justice Patterson in *Sokolski* v. *Buttenwieser*, 96 App. Div. 18, 22, as follows: "Abatement from the purchase price has been allowed for deficiency in title as to the quantity or quality of the property sold, but none of the cases in this State have gone to the extent of making an allowance in diminution of the purchase price named in an executory contract for the sale and purchase of land, where such an allowance would be contrary to the

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terms of the contract and to the express stipulations of the contracting parties and where it would in effect be making a new contract between them." Applying this rule to the case at bar, it is apparent that in any aspect that can be taken of the case the plaintiff is not entitled to the deduction or abatement sought. It being clear that the plaintiff, and not the defendant, has failed to comply with the terms of the contract, and that he is in default, the plaintiff cannot recover back the money paid thereon (*Lawrence* v. *Miller*, 86 N. Y. 131; *Steinhardt* v. *Baker*, 163 id. 410; *Beveridge* v. *West Side Const. Co.*, 130 App. Div. 139, 114 N. Y. Supp. 521; *Moskowitz* v. *Schwartz*, 126 N. Y. Supp. 632; *Feldmann* v. *Reliant Holding Co.*, 129 id. 504), or have a specific performance of the contract (*Steinhardt* v. *Baker*, *supra*), and it would therefore seem from what has preceded that no relief of any sort can be granted to him in this action. The defendant is therefore entitled to judgment dismissing the complaint upon the merits, with costs. The requests for findings of the respective parties have been passed upon as indicated on the margins thereof. Submit for my signature upon notice a decision embodying, without change of language, all findings made by me. All papers received by me, including copy pleadings, briefs, exhibits and filed papers, have been returned to the clerk, to whom all further papers should be handed in, with proof of service.

Judgment for defendant.

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JOSEPH F. LOUGHERY, Plaintiff, *v.* VITO CATALANO and Others, Defendants.

(Supreme Court, Bronx Special Term, December, 1921.)

Mortgage — foreclosure — equity — election to demand principal not enforced, if unconscionable — certain minor repairs held not to violate covenant that alterations without consent of mortgagee permitted whole amount to become due — city of New York — Tenement House Law, §§ 121, 122, not applicable.

Equity will not permit a party to avail himself of a legal right for the purposes of injustice or oppression.

While an action to foreclose a mortgage is equitable in its nature an election to demand payment of the principal sum, if unconscionable, will not be enforced.

A purchase money mortgage contained a covenant that should any alterations in the building on the premises be made without the consent of the mortgagee, then at his option the whole amount of the principal sum should immediately become due and payable. Without the consent of the mortgagee the mortgagors, in order to dry up and prevent the flooding of the cellar, cut a door in the foundation wall and also erected wooden partitions in the basement, removed two foundation piers which were unsafe, and substituted others therefor, and cut a window in the rear of the apartment on the first floor in order to afford safe access to the yard by means of an open porch. In an action to foreclose the mortgage for an alleged violation of said covenant, it appeared to the satisfaction of the court that the defendants, in making such alterations, had no idea that they were violating the provisions of the mortgage. It further appeared that all the work, which plaintiff knew was going on and made no objection thereto until he served notice of his election to call in the mortgage, was necessary and proper in order to preserve the building and the proper and convenient use thereof. Plaintiff made no claim that he had been injured by the alterations or that his security had been impaired in the slightest degree, and the evidence showed that the alterations had enhanced the value of the property. *Held,* that in the circumstances the election of plain-

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tiff to demand payment of the mortgage debt was manifestly unconscionable and that defendants were entitled to judgment dismissing the complaint upon the merits, with costs but no extra allowance.

It appearing that the mortgage had still over five years to run, with interest at four and one-half per cent, and that if the relief sought was granted plaintiff would be enabled to collect the mortgage debt far in advance of maturity and loan the money out at a higher rate of interest, his contention that it was not important whether the security of his mortgage was impaired or not, was untenable.

A further contention by plaintiff that even if the mortgage did not contain the covenant in suit he had, under sections 121 and 122 of the Tenement House Law, a right to call in the mortgage upon his discovery that the alterations were being made without an application for a permit having been filed, was also untenable, as the case did not fall within the provisions of the statute relied upon, but even so, the effect of the failure to file plans and specifications before making the alterations was avoided by the subsequent approval thereof by the proper authorities, and the issuance of the appropriate permits.

ACTION to foreclose a mortgage.

Jacob Hillquit, for plaintiff.

Francis M. Testa, for defendants.

GIEGERICH, J. The action is to foreclose a purchase money mortgage upon the premises known as and by the street number 904 East Two Hundred and Thirteenth street, in the borough and county of The Bronx, city and state of New York, made on or about the 15th day of March, 1920, by the defendant Frank Passalacqua to the plaintiff to secure the payment of $5,000 as follows: $500 on September 1, 1920, and the balance of $4,500 on March 15, 1927, with interest thereon at the rate of four and one-half per centum per annum. There remains unpaid upon the mortgage the sum of $4,500. The mortgage, among other things,

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contains the following provision: "No alterations shall be made to the present building on the premises covered by this mortgage without the consent of the holder of this mortgage, and should any alterations be made without first obtaining such consent, then at the option of the mortgagee the whole amount of the principal sum shall immediately become due and payable." The plaintiff claims that between, on or about the 1st day of August, 1920, and the 26th day of May, 1921, the defendants, including the then owner of the fee of the said premises, violated the foregoing covenant in that, without his consent, a door and window were cut in the westerly foundation wall; wooden partitions were erected in the basement; two foundation piers were removed and others substituted; a kitchen window on the first floor was made into a door, and a stairway in the rear was removed and an uncovered wooden porch was erected across the rear of the said building. The plaintiff further claims that upon discovering that alterations to the building were being made without his consent he availed himself of the option so contained in the covenant and elected that the whole of the principal sum of the bond and mortgage, with interest thereon, should immediately be due and payable, and that notice of such election was given to the defendants on or about May 26, 1921. An action to foreclose a mortgage is equitable in its nature, and an election to demand payment of the principal sum will not be enforced if unconscionable in character. *Bieber* v. *Goldberg*, 133 App. Div. 207, and cases cited. I am at a loss to understand upon what equitable principle a judgment of foreclosure and sale can be decreed in this case. The work complained of did not change the character of the building or the use to which it was put when the mortgage in suit and the bond secured thereby were executed and delivered.

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The cutting of a door in the foundation wall and the enlarging of a window was done in order to dry up the cellar in the building and to prevent the flooding of the same; the brick foundation piers were rebuilt because of the unsafe condition of the same, and a window in the rear of the apartment on the first floor was cut down in order to provide safe access to the yard by means of an open porch. All this work was therefore necessary and proper in order to preserve the building and the proper and convenient use thereof. Moreover, the evidence satisfies me that such work was not substantial in character; the foundation walls of the building have not been weakened and the value of the plaintiff's security has not been impaired. The defendants claim that the plaintiff consented to the alterations, at least to those made in the cellar, and that even if he did not expressly consent to the alterations he impliedly did so, because, as they claim, the plaintiff knew that the work was going on and that he made no objection to it until he served the notice that he elected to call in the mortgage. The plaintiff, on the other hand, testified that he never consented to the making of any alterations and that he, in fact, had never been asked to consent. While I am inclined to give credence to such testimony of the plaintiff, I am satisfied that the defendants in making such alterations had no idea that they were violating the said provisions of the mortgage. The plaintiff does not claim that he has been injured by the alterations, or that his security has been impaired in the slightest degree. On the contrary it would appear from the evidence that they have enhanced the value of the property. He, nevertheless, maintains that it is not important whether the security was impaired or not; that the mortgagor agreed in the covenant in question that he would not make any alterations without the

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consent of the mortgagee, and that if he did, he agreed that the holder of the mortgage would have the right to demand his money and foreclose in the event that it was not paid. The plaintiff in urging such point has evidently overlooked or ignored the very important fact that the mortgage has still over five years to run and bears interest at the unusually low rate of four and one-half per centum per annum, and that if the relief sought by him is granted he will be enabled to collect the mortgage debt far in advance of the maturity thereof, and to loan out the money at a higher rate of interest. The election of the plaintiff to demand payment of the mortgage debt made under the foregoing circumstances is manifestly unconscionable. It is a familiar principle of equity-jurisprudence that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. *Noyes* v. *Anderson,* 124 N. Y. 175; *Ver Planck* v. *Godfrey,* 42 App. Div. 16; *Gilbert* v. *Shaw,* 63 Hun, 148, 154; *Palmer & Singer Mfg. Co.* v. *Barney Estate Co.,* 149 App. Div. 136. A judgment of foreclosure and sale should therefore not be decreed. The plaintiff claims, however, that under the provisions of sections 121 and 122 of the Tenement House Law he would, even if the mortgage did not contain the covenant in suit, have a right to call in the mortgage upon the discovery by him that the mortgagor was making alterations to the premises without filing an application for a permit. I do not think the present case falls within the provisions of the statute relied upon, but if it does I think the effect of the failure to file plans and specifications before making the alterations is avoided by the subsequent approval thereof by the Tenement House Department and the Building Department, and the issuance of the appropriate permits. My conclusion is that the defendants

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are entitled to judgment dismissing the complaint upon the merits, with costs, but with no extra allowance. The requests for findings of the respective parties have been passed upon as indicated on the margins thereof. Submit for my signature, on notice, a decision embodying, without change of language, all findings made by me. All papers received by me, including briefs, requests for findings and filed papers, have been returned to the clerk, to whom all further papers should be handed in, with proof of service.

Judgment for defendants.

SAMUEL STEWART et al., Plaintiffs, *v.* HARRY TURNEY et al., Defendants.

(Supreme Court, Cayuga County, December, 1921.)

Injunctions — leases — rights of riparian owners — defendants enjoined from hunting on shore of lake where hunting privileges were leased to plaintiff by owner of uplands.

While hunting upon and fishing in navigable waters are incidental to the right of passage over them, the enjoyment of these incidents to navigation does not in any event justify the continuous use of the shore.

A lease to plaintiffs from the owner in fee of certain premises, whose title did not extend to any part of the land under water, described the property as the land "which borders or has a frontage on Cayuga Lake and is known as Judsons Point." The lease further recited that it was understood that the lessees acquired no right in the land except for hunting and trapping purposes, for which the lessees agreed to pay a stated annual rental. In an action to restrain defendants from hunting upon a portion of the shore in which plaintiffs claim the exclusive privilege of hunting under their lease, the answer alleged that the title to the waters of Cayuga lake, including the bank and the shores thereof, is vested in the people of the state of New York and that at the times mentioned in the complaint defendants were hunting on state property. It was

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proven on the trial that on different occasions between certain dates all of the defendants hunted ducks from a hide or blind from that part of the lake shore included in plaintiffs' lease, and when requested to desist, refused to do so; it was also established that the premises were duly posted pursuant to the Conservation Law. *Held*, that assuming that defendants' contention as to the ownership of the soil was true, and interpreting their conduct by the most favoring rules, their position was untenable, and plaintiffs are entitled to judgment for the relief demanded in the complaint.

Certain exhibits excluded after decision reserved as to their competency, and defendants given an exception to the ruling.

ACTION to enjoin defendants from hunting upon premises fronting on Cayuga lake of which the plaintiffs are the lessees and claim to be entitled to the exclusive privilege of hunting thereon.

Harry A. Gleason (Frank S. Coburn, of counsel), for plaintiffs.

Nelson L. Drummond, for defendants Turney, Hoff and Dooley.

George B. Becker, for defendant Bausch.

STEPHENS, J. The plaintiffs seek in this action to restrain the defendants from hunting upon a portion of the shore of Cayuga lake in which plaintiffs claim the exclusive privilege of hunting by virtue of a lease from the United States Gypsum Company, the owner of the premises bordering upon the lake; the particular acts of which plaintiffs complain are that on several occasions after the execution of the lease on October 22, 1920, the defendants hunted ducks from that part of the lake shore included in their lease and thus infringed upon their sole prerogative.

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The defendants in their answer in addition to putting in issue the allegations of the complaint allege that the title to the waters of Cayuga lake, including the bank and the shores thereof, is vested in the people of the state of New York and that they were hunting on state property at the times mentioned in the complaint.

It was proven on the trial that on different occasions after October 1, and before December 10, 1920, one or more of the defendants, the different occasions, however, involving them all, hunted ducks from a hide or blind located upon that part of the lake shore included in the plaintiffs' lease, and when requested to desist, refused to do so; it was also established that the premises were duly posted pursuant to the Conservation Law.

The lease to which reference has been made and upon which the plaintiffs predicate their claim to exclude the defendants from the privilege of hunting on the shore was made by the United States Gypsum Company, who owns the fee of the upland, to the plaintiffs; it briefly describes the demised property and by way of further identifying or indicating its peculiar value refers to it as land " which borders or has a frontage on Cayuga Lake and is known as Judsons Point * * *;" the lease further recites that it is understood that the plaintiffs acquire no right in the land except for hunting and trapping purposes; for this privilege of hunting, trapping, erecting a camp, and posting the land the lessees agreed to pay the annual rental of $100.

The deed by which the gypsum company acquired title to the property in question described the westerly and lakeside border as running " along the shore of said lake;" its title, therefore, does not extend to any part of the land under water. *City of Geneva* v. *Henson*, 195 N. Y. 447.

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The plaintiffs' position is that the title of their lessors extends to low water mark; the defendants on the other hand insist with equal earnestness that the land upon which the plaintiffs have acquired hunting rights by their lease extends only to the line of vegetation or what might be termed high-water mark, leaving an expanse of shore between said line and the waters' edge over which the plaintiffs have no hunting rights superior to those of the defendants; the argument on behalf of the defendants is founded upon the proposition that the title to the soil of the bed of the lake is in the state and that the foreshore, or strip of land between the low-water mark and the high-water mark or the vegetation line, is part of the bed of the lake, and that the defendants being on state property were immune from interference by the plaintiffs.

The counsel for the defendants with great thoroughness in research have challenged a like wide excursion into the historical and judicial literature bearing upon the subject under review, but I am quite satisfied that we have travelled far afield in our quest only to find that what I believe to be the solution of the problem lay much nearer at hand.

It is not of controlling importance in whom the title to the bed of the lake is vested, nor what constitutes the bed of it, nor where the water line was formerly or is now, nor to which one of the water marks the title of plaintiffs' lessor extends; nor are we gravely concerned whether the title both to the waters and to the soil is held by the people in trust and, therefore, inalienable, or whether the waters only are held in trust for the purposes of navigation and transportation and the land beneath them held by the people as a proprietor; all this has been the subject of extended and learned discussion by the

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courts in the authorities cited, which does not greatly tend to simplify our present investigation; for as it was said in *Smith* v. *City of Rochester*, 92 N. Y. 463, at page 480, " When it is considered that the rights and interests of the public, such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign, it would seem to follow that the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved."

In any event, the gypsum company from whom the plaintiffs' rights are derived is a riparian owner and entitled to the privileges that inhere in such ownership; the defendants, on the other hand, have no rights in the lake or its underlying soil except such as are common to all the people at large; the plaintiffs possess not only these common rights but also the rights of the proprietor of the land adjacent to waters and it is in the recognition of this differential between public and several benefits that the precise question here for decision is to find its answer.

The rights of the public in navigable waters are not conditioned upon the ownership of the underlying soil in the state, and the state can improve them to facilitate navigation and transportation regardless of the private ownership of the bed (*Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178; *Fulton L., H. & P. Co.* v. *State*, 200 id. 400), and if the state own the soil under the waters the public rights are not essentially enlarged; in the one circumstance the public have an easement in privately owned property and in the other the private owner has an easement in land owned by the people.

The rights of a riparian owner additional to those to which the public are equally entitled have not been

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definitely fixed; those that have been expressly enumerated are the right of access from his upland to the navigable waters for navigation, fishing and bathing and in general phrase, for such other uses as commonly belong to such ownership, the right to erect wharves and piers if they do not interfere with the paramount public right of navigation and the right of preference to a grant by the state of the land under the water, if a grant be made and such a grant cannot be made to another that will obstruct his beneficial enjoyment of the waters; moreover, these riparian rights constitute property and if taken for public good due compensation must be made. *Rumsey* v. *New York & N. E. R. Co.*, 133 N. Y. 79; *Town of Brookhaven* v. *Smith*, 188 id. 74; *Barnes* v. *Midland R. R. T. Co.*, 193 id. 378.

Conceding for the purpose of our inquiry that the title to the shore of Cayuga lake is in the state it remains to be determined whether the defendants were within their rights in occupying a hide or blind, built either by them or the plaintiffs, on the shore, placing their decoys in the neighboring waters, for the purpose of shooting wild ducks that might respond to their lure.

That the title to the land upon which they were operating is in the state is not a sufficient answer to the claim that their presence was an invasion of the plaintiffs' rights; for even the proprietor of the shore cannot exercise all the rights of ownership to the detriment of the upland owner, for other purposes than those of commerce. *Oelsner* v. *Nassau L. & P. Co.*, 134 App. Div. 281; *Tiffany* v. *Town of Oyster Bay*, 192 id. 126.

If it were their privilege to so occupy the shore since it was not created by a grant, or by prescription, it is a privilege common to all as an incident to

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the public or common rights in navigable waters and of the shore.

Hunting upon and fishing in navigable waters have been held to be incidents to the right of passage over them (*Trustees of Brookhaven* v. *Strong*, 60 N. Y. 56; *Smith* v. *Odell*, 194 App. Div. 763; *Sloan* v. *Biemiller*, 34 Ohio St. 492; *Bodi* v. *Winous P. S. C.*, 57 id. 226); but not where the title to the bed of a stream was in private ownership. *State* v. *Shannon*, 36 Ohio St. 423.

The enjoyment of these and kindred incidents to navigation, however, does not in any event justify the continuous use of the shore. *Cortelyou* v. *Vanbrundt*, 2 Johns. 357; *Post* v. *Pearsall*, 22 Wend. 425.

It was once long ago held that the public have no highway along the margin of our navigable rivers and lakes unless the same has been acquired by grant or prescription. *Ledyard* v. *Ten Eyck*, 36 Barb. 102.

There is no practical distinction in the defendants' use of the shore as an incident to passage over the waters, or over the shore, and the beneficial use not incidental to passage; in the latter case the riparian owners can prevent such an intrusion on the shore made under a claim of right with the asserted intention of continuing it. *Johnson* v. *May*, 189 App. Div. 196.

It has not been necessary to state the varying rules relative to tidal and inland navigable waters, or those constituting boundaries, for assuming the defendants' contention as to the ownership of the soil be a valid one and interpreting their conduct by the most favoring rules, I am satisfied that their position is untenable.

I do not yield to the argument that the Cayuga Indians are necessary parties to the action; the reservation by them of hunting and fishing rights over the territory in question in the treaty with the state of New York of February, 1789, does not enlarge the

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privileges of the defendants who make no claim to Indian rights, nor curtail those of the plaintiffs except as the Indians who cannot be excluded may assert their rights to fish and hunt. *People ex rel. Kennedy* v. *Becker*, 215 N. Y. 42.

It follows from the foregoing considerations that the plaintiffs are entitled to the relief demanded in the complaint.

On the trial the defendants offered in evidence certain exhibits and decision of their competency was reserved; each of them is excluded and defendants may have an exception to the ruling.

Appropriate findings may be prepared and presented for signature in accordance herewith; plaintiffs are entitled to costs.

Judgment for plaintiffs.

VALENTINE SCHULTZ, Plaintiff, *v.* JOHN BUSENDORF, Defendant.

(Supreme Court, Erie County, December, 1921.)

Vendor and purchaser — right of way — real property — contracts — equity — reformation of instrument — agreement "subject to all leases" held to include right of way for pipe line for oil or gas — vendee's sale of personal property waived alleged defect in title to realty — estoppel — specific performance — equity will reform contract though not requested in pleading.

Where from surrounding facts and circumstances the intent of the parties to a written contract, in their mistaken use of a particular word is plain, parol evidence is admissible to show its intended meaning and its precise and technical meaning cannot be insisted upon.

Where a written contract fails to express the real agreement of the parties, the court in the exercise of its equity powers, upon a proper case made, is in duty bound to reform the con-

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tract even though in an action thereon the defendant by his answer has not asked for a reformation.

A contract for the purchase of a farm lying in part on both sides of a highway, and also certain personal property, in express terms provided that, "The above described property is being sold subject to all leases against the property with the Iroquois Natural Gas Co." After the intending purchaser had entered into possession there was delay in closing the deal but finally the title was rejected on the alleged ground that a certain right-of-way owned by a company, to lay, maintain and operate a pipe line for the transportation of oil or gas over the farm, rendered the title bad. In an action to recover the amount paid on the contract when it was made, and also to recover certain amounts claimed to have been expended on the property in excess of those received for produce sold, the answer put in issue certain of the allegations of the complaint and prayed for a specific performance of the contract. It was established on the trial that plaintiff knew of the pipe line, made no objection to it and, in connection with the statement that he had paid too much for the farm, said to defendant's attorney, referring to the well and line, which gave his house a full supply of gas, that those were the only things that made him buy the farm. *Held,* that the word "leases" in the contract which was drawn by one not a lawyer, was intended to describe the very right-of-way to which objection was made; otherwise the word, which in itself was a misnomer, would be meaningless.

The action of plaintiff, who still is in possession of the farm, in selling a considerable portion of the personal property on the place, which he had no right to do until payment of the purchase price according to the terms of the contract, was a waiver of the alleged defect in the title, and he cannot be heard to insist upon the objection now.

Judgment for the reformation of the contract and for the specific performance of the same as reformed.

ACTION for damages for alleged breach of contract for sale of real estate.

James A. Magoffin, for plaintiff.

Albert L. Stratmeier and Fred J. Blackmon, for defendant.

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WHEELER, J. Busendorf, the defendant, was the owner of a farm of some forty acres, thirty of which laid on one side of a highway and ten on the opposite side. The farm was for sale. The plaintiff came to this farm, made an observation of the place, and on the next day came again and after a further observation and examination, verbally agreed to buy the thirty acres, and paid $50 down. Subsequently, he wished to acquire the ten additional acres, and agreed to purchase the entire property for $14,000. This price included the personal property on the farm, saving and excepting certain specified things which the defendant was to retain.

The plaintiff at once moved upon and took possession of the farm. He expressed a wish, however, to have the contract of purchase put in writing, and had a contract drawn for execution, by a notary public, which was presented to the defendant for his signature. The defendant refused to sign until some modifications in the contract were made, relating to the personal property. It was then, and on or about the seventeenth of June, signed by both parties. This contract by its express terms provided that: *"The above described property is being sold subject to all leases against the property with the Iroquois Natural Gas Co."*

The evidence shows that in 1910 Busendorf had conveyed to the United Natural Gas Company of Oil City, Penn., a right of way to lay, maintain and operate a pipe line for the transportation of oil or gas over the farm in question, which right of way was subsequently transferred to and is now owned by the Iroquois Natural Gas Company. A pipe line or main eighteen or twenty inches in diameter was actually laid across the farm, and at the time of the contract in question was being operated. In addition to this line,

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the Iroquois Natural Gas Company had sunk a gas well on the property which produced gas, some of which was piped to the Busendorf house for domestic purposes, and which, by arrangement, Busendorf had the right to consume without charge to him.

Schultz paid the defendant $2,000 on account of the purchase price of the property, and has paid nothing further.

After the making of the contract and the plaintiff's taking possession, there was delay in closing the deal. A search was furnished by the defendant, and finally the title was rejected by the plaintiff on the alleged ground that the right of way above referred to rendered the title bad. Thereupon a deed was tendered, and a demand made on the plaintiff for a fulfillment of the contract, which he declined, for the reason stated. Thereupon the plaintiff began this action to recover the $2,000 paid, and also to recover certain amounts he claimed to have expended on the property over and above sums received from produce sold.

The defendant in his answer put in issue certain allegations of the complaint, and prays for a specific performance of the contract.

The principal contest on the trial arose over the question whether the defendant tendered a good and marketable title saving and excepting "*all leases now against the property with the Iroquois Natural Gas Co.*"

The plaintiff contends that the right of way for the gas main did not come within the exception of "leases," and therefore the defendant could not convey a good title to the premises, and that plaintiff is, therefore, justified in his refusal to carry out the contract.

The defendant contends that the plaintiff before

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making the contract was fully informed of the existence of the pipe line across the farm, knew all about it, and that the term "leases" used in the contract was intended to describe and cover such right of way, and to provide the plaintiff should take title subject to it.

On the other hand, the plaintiff contended on the trial that he was ignorant of the existence of the pipe line or the grant, and did not know of it until after the contract had been signed, and his attention called to it by the attorney who examined the title for him.

The court, however, is convinced by the evidence that the plaintiff did in fact know about the pipe line; that he was told of it by the defendant; that it was pointed out to him, and he was shown where it ran. The evidence satisfies the court that in conversations with others after the contract was made, he showed he knew of the pipe line laid across the farm, and made no objection to it, and stated to the attorney for the defendant, referring to the well and line (which gave his house a full supply of gas) that those were "the only things * * * that made him buy the farm." This was said in connection with the statement that he had paid too much for the farm, and when he evinced a dissatisfaction with his bargain.

We think the contract itself indicates a knowledge of the existence of the right of way for a pipe line. It will be noted that in the contract the word "leases" is used — the plural of the word is employed — indicating the existence of more than one *lease*. The only other lease, if it may be so termed, which existed was that of the gas well on the ten-acre parcel on the opposite side of the highway. So it is fair to presume that the word "*leases*" was intended to describe the well and the right of way, both held and owned by

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the Iroquois Natural Gas Company; otherwise the word used would be meaningless, as it could refer to nothing else. We are satisfied, therefore, that when the word "*leases*" was written into the contract, it was intended to describe the very right of way to which objection is now made. The word employed was, it is true, a misnomer, for a grant of a right of way is not, strictly speaking, a lease. We must not, however forget that the contract was not drawn by a lawyer, but by a layman, whose use of legal terms is not so precise and exact as by a member of the legal profession. We can well understand how one not a lawyer might well describe such a grant as a lease, although technically incorrect.

We then come to the question whether a misdescription by name of a thing intended to be described by parties to a contract will justify parties in insisting on the precise and technical meaning of the words. We think not, where the intent is plain as shown by the surrounding facts and circumstances, and that parol evidence may be resorted to for the purpose of ascertaining the real meaning of the term used.

There is this further consideration. This is an equity action, in which equitable relief is asked. It is tried as such. If the contract, in law and in fact, fails to express the real agreement of the parties, and a proper case is made, then the defendant has an equitable right to have the instrument reformed so that it will express that agreement. It is true, the defendant has not asked for a reformation in his answer, but a court of equity in administering justice affords such relief as the facts warrant, and if it be necessary to reform the contract, has the power, as it is its duty to do. *Russell Hardware & Imp. Mfg. Co.*

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v. *Utica Drop Forge & Tool Co.*, 195 N. Y. 54; *Jewett* v. *Maytham*, 64 Misc. Rep. 488.

The contract was prepared, not by the defendant, but by the direction of the plaintiff, and should express the real agreement and understanding of the parties to it as orally agreed on before it was drafted.

There are other considerations which we think make it necessary that the decision of this case should be for the defendant. As we have previously stated, the contract of sale and purchase provided that with the realty, the plaintiff was to acquire practically all the personal property on the place. The plaintiff went into possesson both of the farm and of the personal property. He knew, as we have found, of the pipe line and of the grant of right of way. He knew, and must have known, that owing to its nature, it was there to stay, and was beyond the power of the defendant to cause its removal. If the plaintiff objected to its presence and intended to reject the title for those reasons, then he was called on to act promptly in making known his objections, and to do nothing inconsistent with that position. He was called on to act in harmony with that determination. The undisputed evidence is, however, that after knowledge of the alleged defects in title, the plaintiff proceeded to sell and dispose of not only the crops growing on the lands, but also to sell and dispose of the farm equipment, and even of live-stock on the farm. This was done, in part, even after he had in fact objected to the title. The parties could not then be restored to their former position. It should be borne in mind that the contract between the parties called for the sale of not only the land, but of the personal property as well. The plaintiff was not at liberty to repudiate as to the land, and treat the personalty as his own. The entire contract must stand or fall.

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While it is undoubtedly true that knowledge in the grantee of existing easements does not defeat his right to object to the title (*Pryor* v. *City of Buffalo*, 197 N. Y. 123, 136–137; *Huyck* v. *Andrews*, 113 id. 81; *Callanan* v. *Keenan*, 224 id. 503–508), nevertheless, the purchaser may so deal with the subject matter of the contract that he will be held to have waived objections which otherwise might have been made.

The contract gave the plaintiff no right to appropriate or dispose of any of the personal property on the place until payment had been made according to the terms of the contract. Right of possession gave no right of disposition. Notwithstanding, it is claimed the plaintiff did proceed to sell all the personal property on the farm — certainly a very considerable portion thereof, after he knew about the existing pipe line right of way. We think this action on his part must be construed as a waiver of the defect in title, on which he now insists. The evidence is that after he had knowledge of the existence of the right of way he raised no objection to the title on that account — in fact stated to the attorney for the defendant that the advantages of the gas well and main were the things inducing him to make the purchase, which, however, he afterwards rejected on the ground the farm was not worth what he had agreed to pay for it, and stating he was ready, notwithstanding, to close the deal provided some differences which had arisen about the personal property could be adjusted. This was said in August.

We think, by taking and continuing in possession of the farm, and in disposing of the personal property on it, and by exercising acts of ownership after the alleged defects were known, without any agreement qualifying his acts, the plaintiff must be deemed to have waived the defects complained of. The authorities support this view of the case.

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The continuance of the possession by a vendee is a constant and continued affirmance on his part that the holding is under it, and conclusively proves that the contract has not been abandoned. *Northrup* v. *Mead,* 121 App. Div. 385, 390. And so it has been held that a purchaser of real property must surrender possession of the property acquired under a contract before he can maintain an action for its rescission. *Tompkins* v. *Hyatt,* 28 N. Y. 347, 350; *Northrup* v. *Mead, supra; Goelth* v. *White,* 35 Barb. 76–78; *More* v. *Smedburgh,* 8 Paige, 600; *Schiffer* v. *Dietz,* 83 N. Y. 300, 308.

So, where there were existing easements affecting the property, and the vendee continued in possession and committed acts of ownership, it was held such conduct amounted to a waiver of any defect in title, and specific performance would be decreed. *Canton Co.* v. *Baltimore & Ohio Rd. Co.,* 79 Md. 424, 431; citing many English authorities.

Fry, in his work on Specific Performance, in discussing the general principles governing cases of this character, says: "So with regard to the contract itself — if the defendant contends that it is a nullity, and, after having become aware of the facts on which he relies for this contention, has gone on acting as though there was a subsisting contract, he will be estopped from subsequently taking the objection." § 1346, p. 656 (5th ed.).

So, where an estate was subject to a reservation of rights of sporting, and where the vendor could not cure, if the vendee takes possession with knowledge, he was held to have waived the right to object to the reservation in question. *Burnell* v. *Brown,* 1 J. & W. 168. To this effect, see cases cited by Fry on Specific Performance, pages 655, 656.

The application of these principles to the facts of this case seem to compel a decision for the defendant.

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The contract must be treated as an entirety, in so far as it relates to both real and personal property. The plaintiff has dealt with the personal property as his own; he has sold and disposed of it for his own benefit, after full knowledge of the alleged defects in the title to the realty. He has continued and still continues in possession. We think he must, under the circumstances, be held to have waived any such defect, and cannot now be heard to insist on the objection raised.

A decision may, therefore, be drawn in accordance with these views, with costs to the defendant.

Ordered accordingly.

JOHN J. DONLEN, as Committee, etc., of ANNA T. McCANN, Incompetent, Plaintiff, *v.* FIDELITY AND CASUALTY COMPANY, Defendant.

(Supreme Court, Kings County, December, 1921.)

Insurance — disability policy — incurable malady — incompetent person — weekly indemnity for "confining disability" allowed patient at institution for insane — amount based upon assured's expectancy of life not recoverable — going from building to building within grounds not evidence that assured was not confined.

Where shortly after the defendant had issued a teacher's life, indemnity, accident and health disability policy, the assured, who is suffering from an incurable malady, was duly adjudged an incompetent and has since been confined in a public institution for the insane, an action to recover an amount based upon the assured's expectancy of life, as shown by the Northampton tables, is not maintainable.

The defendant, as evidenced by the policy, agreed that "if the assured suffers confining disability the company will pay * * * for the period of said disability not exceeding 52 weeks" a certain amount per week, and "if the assured suffers non-confining disability the company will pay the assured as follows for the part of said non-confining disability, if any, within 52

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weeks from the beginning of the preceding confining disability" the sum of five dollars per week, and "after the said 52 weeks so long as the assured lives and continuously suffers said confining disability" the sum of two dollars and fifty cents per week. In an action brought by the committee of the assured to recover damages based upon her expectancy of life the undisputed evidence was that the incompetent is now and since her commitment to the institution has been continuously confined there undergoing the usual course of treatment. *Held*, that the mere fact that in doing the work of a laundress she has gone from building to building under the care of a supervisor and within the grounds of the institution, was no evidence that she was not necessarily confined, and that upon the proof, plaintiff was entitled to judgment for the maximum amount of the weekly indemnity for a period of fifty-two weeks and for one-half the weekly indemnity for the following fifty-two weeks, and one-quarter of the weekly indemnity up to the time of the trial of the action and in addition thereto the sum of fifty dollars for hospital charges, about which there was no dispute.

ACTION on policy of insurance.

James C. Danzilo, for plaintiff.

Nadel, Jones & Mowton (Edward P. Mowton, of counsel), for defendant.

CALLAGHAN, J. On the 18th day of September, 1918, the defendant issued for the benefit of Anna T. McCann, now an incompetent person, a "teacher's life, * * * indemnity, accident * * * and health * * * disability policy" whereby it agreed to pay ten thousand dollars in case of death by accident, and "if the assured suffers confining disability the company will pay the assured for the period of said disability not exceeding 52 weeks" the sum of $10 a week, and "if the assured suffers non-confining disability the company will pay the assured as follows for the part of said non-confining disability, if any, within 52 weeks from the beginning of the preceding confining

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disability" the sum of five dollars per week, and "after the said 52 weeks so long as the assured lives and continuously suffers said confining disability" the sum of two dollars and fifty cents per week. During the month of October, 1918, the said Anna T. McCann was duly adjudged an incompetent person, and since that time she has been confined in a public institution for the insane. The proof shows that she is suffering from an incurable malady, and, based upon the assumption that the incompetent would never fully recover, this action was brought to recover an amount to be based upon the expectancy of life of the incompetent as shown by the Northampton tables, the defendant having first disclaimed all liability under the policy. Plaintiff cannot, however, succeed on this branch of the case. The policy states definitely when and under what circumstances the defendant is required to pay, and its refusal to pay the full amount of the weekly indemnity specified in the policy, based upon its belief that the plaintiff is not entitled to the maximum of such weekly benefits, is not such a refusal to pay or such a denial of its liability as would in any event furnish grounds for an action to recover the full amount of the loss at this time. But, aside from that reason, the policy states definitely when and under what circumstances the weekly indemnity is to be paid, and the plaintiff cannot recover in this action the full amount of plaintiff's damage based upon her expectancy of life. It was the intention of the parties, as evidenced by the policy, to pay only at the times and in the manner specified in the policy. The action was tried by the court without a jury, and the undisputed testimony shows that the incompetent is now and has been since October, 1918, continuously confined in a public institution for the treatment of the insane and is undergoing the usual course of treatment. She has

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never been released from the institution or allowed to go from within the inclosure. She has, however, been required, as part of the treatment laid out by the institution, to do work as a laundress, and in the performance of that duty she has been taken from one building to another under the care of a supervisor and within the grounds of the institution. The question, therefore, to be determined is whether or not the incompetent suffers confining disability within the meaning of the policy. It is the defendant's contention that it is not liable for the maximum amount specified as payments for disability. It bases its contention upon the theory that the malady from which the assured suffers is not one which confines her in the house within the provisions of the policy. The disability contemplated by the parties at the time the policy of insurance was issued is such an illness as ordinarily would confine one to the house. It may be that one suffering from a very serious disease would be able to leave the house and, in fact, attend to business or other duties, but I cannot conceive of a malady which would bring one so clearly within the terms of the policy as that of insanity. The very nature of the disease itself requires confinement not only for the safety of the public, but for the benefit of the patient as part of the treatment for the disease. The mere fact that she has gone from one building to another furnishes no evidence that she was not necessarily confined, particularly as the work which she was assigned to do required those in charge of the institution to take her from one building to the other. I have read all the authorities submitted on behalf of the defendant, none of which are in conflict with these views. It follows, therefore, that plaintiff should have judgment for the maximum amount of the weekly indemnity for a period of fifty-two weeks, and for one-

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half of the weekly indemnity for the following fifty-two weeks, and for one quarter of the weekly indemnity up to the time of the trial of this action, and in addition thereto the sum of fifty dollars for hospital charges, about which there is no dispute. Present findings and judgment on two days' notice.

Judgment for plaintiff.

ANNIE W. STEPHENS, Plaintiff, *v.* GEORGE M. CRAIGEN COMPANY, Defendant.

(Supreme Court, Kings County, December, 1921.)

Executors and administrators — wills — dower — widow conveying real estate as sole executrix and trustee under a power of sale in her husband's will is estopped from thereafter claiming dower although the will did not declare that the provisions made for the widow were in lieu of dower, the deed reciting that she conveyed all the estate which she had power to convey, whether individually or by virtue of said will — Real Property Law, §§ 245, 256.

The husband of plaintiff devised to his executors and trustees, with a valid power of sale, certain real propery in trust for his wife and children in different proportions but the will did not declare that the provision for the widow was in lieu of dower. Nine years after the death of the husband the widow, acting as sole executrix and trustee, conveyed certain of the devised premises to the predecessors in title of defendant by a deed reciting that she conveyed "all the estate therein which the party of the first part has or has power to convey or dispose of whether individually or by virtue of said will or otherwise." *Held*, that where in an action by her to establish and recover a dower interest in the property, brought after the defendant had undertaken a substantial improvement to the property, it appeared that plaintiff had never entered upon the premises or made any other attempt to establish her dower therein, a judgment will be granted in favor of the defendant.

The above quoted language of the deed being verbatim that of section 256 of the Real Property Law which, read in con-

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nection with section 245 of the same statute, is a complete answer to plaintiff's claim, estops her from claiming any interest in the land.

If plaintiff deems it advisable to now assert a claim for dower it is her duty both in law and equity to assert it against the proceeds of sale received by her grantee, and not against her grantee's assigns.

ACTION to recover dower.

I. T. Flatto, for plaintiff.

Edward M. Perry, for defendant.

VAN SICLEN, J. Plaintiff's husband died in 1903 leaving a will wherein he devised his real property to his executors and trustees, one-third for his wife and two-thirds for his children. A valid power of sale was given to the executors and trustees. The plaintiff was acting as sole executrix and trustee in 1912 when she conveyed certain of the devised premises to the predecessors in title of the defendant. In the deed she is described as executrix and so she signed. The body of the deed recites that she conveys "all the estate therein which the party of the first part has or has power to convey or dispose of whether individually or by virtue of said will or otherwise."

The plaintiff now seeks to establish and recover a dower interest in this property. There is no doubt that she intended to convey the fee and that her grantor intended to get the fee. She has waited until the defendant had undertaken a substantial improvement of the property before asserting her claim and thus increase the embarrassment. Her position is anything but equitable and she is not entitled to a recovery unless there is some compelling rule of law or statute that demands it.

The will does not recite that the provision for the widow was in lieu of dower. Neither has she ever

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entered upon these lands or made any other attempt to establish her dower therein, so that there is no assistance to be spelled out of that aspect of the matter for either party. Although there is some authority for the contention that such a provision as this may be construed as in lieu of dower. *Asche* v. *Asche,* 113 N. Y. 232; *Wood* v. *Seely,* 32 id. 105; *Matter of Gorden,* 172 id. 25.

The intention of the parties as disclosed by the papers is clear enough. The wording of the habendum clause states plainly that all the estate of the grantor not only as executor but also as an " individual " and " by virtue of said will or otherwise " was to be conveyed. In the face of such language only a specific reservation of the right of dower could except it therefrom.

"A conveyance of land, like all other instruments, should be so construed as to effectuate the intention of the parties to be ascertained from the language and all the surrounding circumstances. (*Thayer* v. *Finton,* 108 N. Y. 394; *Beach* v. *Crain,* 2 id. 86–93.) An exception or reservation in a deed is to be taken most favorably to the grantee, and if there is uncertainty or ambiguity in the language, he should have the benefit of the doubt or the ambiguity. They should be taken most strongly and construed most strictly against the grantor whose words they are and against him who stands in his place, and if an advantage can be gained from an uncertainty or ambiguity in the words, the grantee or person standing in his place is entitled to the benefit of it." *Blackman* v. *Striker,* 142 N. Y. 555, 560.

This language of the deed is verbatim the language of section 256 of the Real Property Law, which taken together with section 245 seems to provide a direct answer to plaintiff's claim. The plaintiff must be

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held to be estopped from now claiming an interest in this land in the face of her deed. *Feinberg* v. *Allen*, 208 N. Y. 215.

"The deed must be held to convey all the interest in the lands which the grantor had unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant." *Blackman* v. *Striker*, *supra* 561.

If as an afterthought the plaintiff finds it advisable to assert a claim for dower in such a situation as this, it is her duty in law and equity to assert it against the proceeds of sale received from her grantee and not against her grantee's assigns for the intention of the parties seems clearly to have been that the plaintiff was conveying and the grantee was receiving all the right, title and interest which the grantor had in the premises.

Judgment will be granted for the defendant.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID MALONEY et al., Relators, *v.* THE SHERIFF OF THE COUNTY OF KINGS, Respondent.

(Supreme Court, Kings Special Term, December, 1921.)

Criminal procedure — witness — habeas corpus — constitutional law — commitment, in default of bail, of necessary and material witness for the people is an unwarrantable interference with the liberty of the individual and unconstitutional — insufficient affidavit not "proof" — no jurisdiction — relators discharged — Code Crim. Pro. § 618-b.

The statute (Code Crim. Pro. § 618-b) which provides that "Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a

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criminal action or proceeding pending in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person to enter into a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may he heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a state prison, as he may deem proper, until he comply or be legally discharged," is an unwarrantable interference with the liberty of the individual, and is, therefore, unconstitutional.

Where on the return to a writ of habeas corpus it appears that the only attempt to show that the several relators were necessary and material witnesses, was found in the affidavit made by the acting chief clerk in the office of the district attorney, wherein it was stated: "I am informed and believe, the sources of my information being statements made to me by Detective James Cunningham, of the New York Police Department, and therefore say that David Maloney (one of the relators) who is in the State of New York, was present at the time of the commission of the said alleged crime, and is a material and necessary witness for the People herein," such evidence is not only too flimsy, but falls far short of "proof," and the county judge was without jurisdiction to require each of the relators to give an undertaking with sureties for their appearance as witnesses on the trial, and in default of such undertakings to commit them to jail, and the relators are accordingly discharged from custody.

HABEAS corpus.

Robert H. Elder, for relators.

Harry E. Lewis, district attorney, and Harry G. Ruderson, assistant district attorney, for respondent.

BENEDICT, J. This case comes before me on the return of a writ of habeas corpus. The district attorney opposes the release of the relators on the ground that they are lawfully detained as witnesses in a

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criminal cause under section 618-b of the Code of Criminal Procedure. The relators claim that this section is unconstitutional. The relators were each required by one of the county judges of Kings county to furnish an undertaking with sureties in the sum of $10,000 to secure the appearance of the relators respectively as witnesses in the said criminal cause, and in default of such undertakings they were committed by the county judge to Raymond street jail.

The first sentence of section 618-b of the Criminal Code reads as follows: "Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding pending in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person to enter into a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may be heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a state prison, as he may deem proper, until he comply or be legally discharged."

Provisions somewhat similar in character were contained in the Revised Statutes of 1828. 2 R. S. 709, §§ 21–24. There was, however, this important difference — that under the Revised Statutes, before a witness could be required to furnish sureties, the magistrate must "be satisfied by due proof, that there is good reason to believe that any such witness (one required to give a recognizance for his appearance) will not fulfil the conditions of such recognizance."

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The present statute permits sureties to be required merely on proof that the person is a necessary and material witness, without even a hint or suspicion that he may leave the state or otherwise evade the process of the court. This, as I understand the relator's argument, is on the ground on which they claim the statute to be unconstitutional — because, without any wrong on their part, either committed, or reasonably to be apprehended, they are required to furnish security, and being unable by reason of poverty to do so, are committed to jail.

I am inclined to think that the contention of the relators is sound. No doubt a witness in a criminal case may be required to give security for his appearance when there is reason to believe that otherwise he will not attend; but where there is no reason to so believe, a requirement that he give security or go to jail works a serious hardship on a poor man, entirely innocent of any wrongdoing, actual or threatened.

It is obvious that oppressive use might be made of such a power. It might even be employed to force the abandonment or withdrawal of a prosecution, because under it a poor complaining witness might be held in custody, while the defendant goes at large under bail. As was said in *Comfort* v. *Kittle*, 81 Iowa, 179, 181: "The power to require persons, without accusation of wrong and without a hearing, to give even their own pledge for their appearance as witnesses, is surely an extraordinary power, and still more extraordinary when security may be required and imprisonment imposed for a failure to give it."

And it was held in that case that sureties could not be required because the statute did not expressly so declare. The fact that our statute provides for a hearing does not, in view of the other provisions above

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adverted to, render the power attempted to be conferred thereby, less extraordinary.

No authority has been presented, either in this state or elsewhere, which holds that such a statute as section 618b of the Criminal Code is constitutional, and I shall, therefore, hold that it is an unwarrantable interference with the liberty of the individual, and hence unconstitutional. The case of *Matter of Petrie,* 1 Kan. Ct. of App. 184, involved a statute which required sureties only where there was reason to believe that the attendance of the witness could not otherwise be secured.

There is also another ground on which the relators should be released; and that is that no *proof* was produced before the county judge, so far as the record before me shows, that the relators were necessary and material witnesses. The only attempt at such proof is found in the affidavit made in the case of each relator by Joseph R. Cummings, acting chief clerk in the district attorney's office. The material part of the affidavit in the case of David Maloney, which may be taken as an example of all, reads as follows: "I am informed and believe, the source of my information being statements made to me by Detective James Cunningham, of the N. Y. Police Department, and therefore say that David Maloney, who is in the State of New York, was present at the time of the commission of the said alleged crime, and is a material and necessary witness for the People herein."

That this falls far short of "proof" is too plain to need argument or the citation of authorities. It is necessary only to refer to the universal construction of somewhat similar requirements in the case of provisional remedies and other forms of relief in civil actions.

I think, therefore, that even if the statute be consti-

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tutional the county judge was without jurisdiction to proceed thereunder on any such flimsy evidence as he had before him.

Writ sustained and relators discharged from custody.

LOUIS C. NEWMAN, Plaintiff, v. ROBINS DRY DOCK AND REPAIR COMPANY, Defendant.

(Supreme Court, Kings Special Term, December, 1921.)

Workmen's compensation — ships and shipping — moving steel plate in shipyard not maritime — Workmen's Compensation Law exclusive — judgment on the pleadings — Rules of Civil Practice, 106(2), 107, 108.

While a contract of employment may be maritime in character a tort arising from the employer's violation of duty in connection with the contract, is not necessarily a maritime tort.

Where the work done upon materials to be used in repairing a ship is wholly performed on land without regard to the nearness of the ship and not requiring the physical presence of the workman at any time on the ship, said work is not such performance of a maritime contract as to oust the State Industrial Commission of its jurisdiction under the Workmen's Compensation Law to make an award to an employee who is injured while doing such work.

Plaintiff employed by defendant as a boiler maker and mechanic was directed by his foreman to leave his usual work and bring into the shop a heavy steel plate which was destined ultimately for use in repairing an ocean going vessel which was undergoing repairs in defendant's dry dock. While so engaged, the hoisting and other apparatus which was built on beams embedded in the ground, loosened, broke or snapped. An action against the employer, which was engaged in the business of ship building and repairing, for injuries caused by the falling of the plate upon plaintiff, was based upon the alleged negligence of the defendant in failing to furnish a safe place to work and safe appliances. *Held*, that the services plaintiff was performing when injured were not of a maritime

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nature within the ruling denying jurisdiction of the State Industrial Commission under the Workmen's Compensation Law.

The jurisdiction of the Industrial Commission in such a case is exclusive, and where defendant's motion for judgment on the pleadings under rule 106(2) of the Rules of Civil Practice, on the ground that the court had not jurisdiction of the subject of the action, is supported by an affidavit pursuant to rule 108 from which and the complaint it is made clear and undisputed that the injuries to plaintiff occurred on land in the manner and under the conditions alleged, and the plaintiff does not avail himself of the right given by said rule 108 to present affidavits in denial of the defendant's claims, the motion will be granted.

MOTION for judgment on the pleadings under rule 107 of the Rules of Civil Practice and for a dismissal of the complaint.

Harry Wandmaker, for plaintiff.

James A. Gray, for defendant.

KAPPER, J. Is work done upon materials to be used in repairing a ship where such work can be and is wholly performed on land without regard to the propinquity of the ship and not requiring the physical presence of the workman at any time on the ship itself, such performance of a maritime contract as to oust the state industrial commission of its jurisdiction under the Workmen's Compensation Law to award compensation thereunder to an employee injured while doing such work, is the question now presented for determination. It arises upon a motion by defendant for judgment on the pleadings under subdivision 2 of rule 107 of the Rules of Civil Practice, "That the court has not jurisdiction of the subject of the action," and is supported by affidavit pursuant to rule 108 from which and the complaint it is made clear and undisputed that the plaintiff's injury occurred *on land* in manner and under con-

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ditions, as follows: The defendant corporation is engaged in the business of shipbuilding and repairing and for that purpose maintains yards, docks and dry docks. At the time of the injuries to the plaintiff the steamship *Attilla,* an ocean-going vessel, was undergoing repairs in defendant's dry dock. Plaintiff was employed by defendant as a boiler maker and mechanic and was known as "a puncher and shearer" on steel plates used in repair work on vessels lying at the docks and in the dry docks. On July 28, 1920, plaintiff was directed by his foreman to leave his usual work and bring in to the shop a heavy steel plate, which was destined for *ultimate use* in repairing the *Attilla.* While so engaged the hoisting and other apparatus which was built upon beams embedded in the ground "loosened, broke or snapped," causing the plate to fall upon plaintiff and thereby inflicting the injuries of which he complains. The action is based upon the alleged negligence of defendant in failing to furnish a safe place to work and safe appliances. Affidavits submitted by defendant show that immediately prior to the accident the steel plate was suspended in the air over a tramcar on a railway which ran to various points in defendant's yards and which was located entirely upon land; that when the plate became detached from the hoist and fell upon plaintiff, he was standing upon the ground at least 100 feet distant from any navigable water; and that the work performed by plaintiff under his employment was all done in and about defendant's shop, "always on land and never on water." These facts must, on this motion, be taken as true inasmuch as the plaintiff stands upon the complaint and the defendant's affidavits and has not availed himself of the right given him by rule 108, *supra,* to present affidavits in denial of defendant's claims. The defendant contends that

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plaintiff's sole remedy is afforded by the Workmen's Compensation Law with the provisions of which it has complied. The plaintiff claims that the jurisdiction of the state industrial commission under the Workmen's Compensation Law uniformly has been denied whenever it has appeared that the person injured was at the time engaged in the performance of a maritime contract irrespective of the place of performance and without regard to the fact of whether such work was required to be carried out on the ship or on the shore. I do not read the cases upon which the plaintiff relies as implying so broad a ruling. The cases which he cites are: *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 id. 149; *Matter of Doey* v. *Howland Co.,* 224 N. Y. 30; *Matter of Anderson* v. *Johnson Lighterage Co.,* Id. 539; *Matter of Keator* v. *Rock, etc., Co.,* Id. 540; *Matter of Newham* v. *Chile, etc., Co.,* 232 id. 37; *Matter of Sullivan* v. *Hudson Navigation Co.,* 182 App. Div. 152, and *Kennedy* v. *Cunard S. S. Co., Ltd.,* 197 id. 459. When the Supreme Court of the United States and the Court of Appeals decided the *Jensen, Stewart* and *Doey Cases, supra,* those courts did not, as I understand it, formulate a rule applicable generally in tort actions to what may be characterized as the performance of maritime contracts irrespective of the place of performance. They were deciding the cases upon the facts of the particular case, and so deciding they were laying down a rule in the *Jensen* and *Stewart* cases governing the work of loading and unloading cargoes and in the *Doey* case the work of making changes on the ship to prepare her for cargo carrying. Were it permissible to subject these so-called maritime tort actions to the *locality test* obtaining in admiralty, namely, that the jurisdiction of admiralty in tort cases is exclusively

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dependent upon the cause of action having arisen on waters subject to admiralty jurisdiction, we should have a workable and unmistakable rule. The question becomes complicated when cases are presented that are not cognizable in admiralty and yet are not subject to the jurisdiction of the state industrial commission because the contract under which the work was being performed is said to be of maritime nature. See *Keator* v. *Rock Plaster Mfg. Co.*, 256 Fed. Repr. 574. While a contract may be maritime in character a tort arising from the employer's violation of a duty in connection therewith is not necessarily a maritime tort. Thus, a material man furnishing supplies or repairs may be regarded as having a contract for maritime service and may proceed against the ship *in rem* or against the owner *in personam* (*North Pacific S. S. Co.* v. *Hall & Co.*, 249 U. S. 119), but assuming that the fabrication of such repair materials at a point miles removed from the ship or navigable waters subjected a workman to injury, could it be said that the tort was occasioned in the performance of a maritime contract within the rule denying jurisdiction of the state industrial commission? In none of the cases cited by the plaintiff, nor in any that my research has disclosed, has the state industrial commission been ousted of jurisdiction upon such a state of facts as is presented by this record. In considering the question as to the nature of plaintiff's employment in the present case, a brief reference to the cases cited by him should be helpful. In the *Jensen* case, plaintiff was on the ship aiding in the work of unloading cargo. In *Matter of Newham*, the claimant was performing services in the operation of loading. In *Matter of Anderson*, claimant was engaged in stevedoring work on the pier in the process of loading. In *Matter of Keator*, claimant was on a dock as foreman engaged in the work of

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unloading. In the *Stewart* case, claimant, who was a bargeman, was on a dock engaged in dismantling a derrick or rigging necessarily used in loading and unloading. In *Matter of Doey,* claimant was on the vessel making a repair when injured. In *Matter of Sullivan,* the accident was upon the boat. In the *Kennedy* case, plaintiff was a longshoreman "working in loading cargo on board the ship." It will be observed that in all these cases the injured party was engaged in the service of *loading or unloading* a vessel's cargo or having a direct connection with such work as longshoremen habitually have, or else he was on the ship itself in the work of making repairs. In the group of cases decided in *Matter of Sullivan* v. *Hudson Navigation Co.,* 182 App. Div. 152, all will be found to have been within one of the two distinct classes, namely, injury while loading or unloading cargo, or injury occurring while at work on the boat itself. These cases may be summarized as follows: *Matter of Anderson* v. *Chadwick & Co.,* the accident occurred on the ship; *Matter of Tacoletti,* the injured employee was engaged in longshore work; *Matter of Bernard Anderson,* the employee was master of a barge and met his death while operating it; and in *Matter of Belknap* the employee was chief engineer on a steamship and was injured while putting its engine in order. As for the cases affecting longshoremen and stevedores whose work involved the actual loading and unloading of a ship, the reasons underlying their disposition are clear. These reasons were stated in *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 61, 62, as follows: "The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and storing a ship's cargo is of this character. Upon its proper per-

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formance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'" The cases involving the actual physical presence on the ship of the servant while engaged in making repairs present no difficulty of decision that the service was maritime in character within the rule denying jurisdiction to the state industrial commission. It becomes necessary, therefore, to decide whether or not the plaintiff at bar may invoke admiralty or common law jurisdiction and render ineffectual the Workmen's Compensation Law in his and like cases. While the reported cases do not enunciate a definite, fixed rule to determine what labor is and what labor is not of a maritime character, I think there is discernable in them the distinguishable feature that the services performed were in immediate proximity to or upon the ship and had a direct and immediate connection with the ship itself as an instrument of navigation. The emphasis is not on the fact of proximity but on the necessity of the element of proximity to permit of performance. Such is the case of the act of loading or unloading cargo as well as the case of physical presence on or actual personal contact with the ship in the making of repairs. The relation arising out of the work of stevedores and longshoremen in handling and loading and unloading cargo could hardly be made to apply to the drayman or truckman who carts goods destined for shipment to the dock or wharf. On the other hand, a case might readily be imagined of ship re-

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pairs by a gang of men part of them working on the boat and part on the dock, all of whom, however, were in the act of physically attaching an essential portion of the repair material to the ship itself. An illustration of the distinction has already been pointed out in the case of the lien of a materialman or supplyman, the work of handling whose material at a point remote from the ship, whether supplies or furnishings, would, if the rule urged by plaintiff were to be adopted, constitute a maritime tort in case the supplies and furnishings were intended for a ship, whereas if intended for a hotel obviously would not be of a maritime character. In the present case, plaintiff's services were performed in shops and yards situated on dry land. That these were located only a short distance from the vessel or from navigable water is immaterial. The controlling considerations are that plaintiff's services had no immediate *physical* connection with the vessel itself and *proximity thereto was not essential to their performance.* His services could have been performed as efficiently wherever the shops and yards were located, as well in Pittsburgh as in Brooklyn. Neither is the fact that the steel plate was destined for ultimate use in the repairs being made on the *Attilla* of legal significance. The services of thousands of employees throughout the land, in many and diversified fields of human endeavor, culminate day by day in finished products which through active intervening agencies in time become a part of some vessel engaged in ocean traffic. None of the cases cited suggests that the final destination for use on a vessel of the finished product of labor clothes such labor *with maritime characteristics.* Such a principle would effect a drastic change in the law and procedure which is the result of years of development and which now governs the respective rights and obligations of employer and

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employee in many fields of industrial activity; the purposes sought to be accomplished by the Workmen's Compensation Law in large measure would be defeated; the jurisdiction of admiralty would be extended to a degree not even suggested in the course of the historic struggle between admiralty and the common law, and the powers of the courts of common law curtailed accordingly. In my opinion there is no such rule. Plaintiff in this case was engaged in the ordinary labor of moving a steel plate in a yard. The services he was performing when injured were not of a maritime nature within the rulings denying jurisdiction of the state industrial commission under the Workmen's Compensation Law which, in my opinon, is exclusive in this case. The motion should be granted.

Motion granted.

EDWARD F. HUTTON et al., Copartners, Doing Business under the Firm Name and Style of E. F. HUTTON & COMPANY, Plaintiffs, *v.* LEONARD A. BLACKBURN, Individually and as Executor of the Last Will and Testament of SAMUEL L. BLACKBURN, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, December, 1921.)

Wills — non-residents — every state has exclusive jurisdiction over property within its borders — constitutional law — will relating to personal property valid in state where executed may be established in New York although not entitled to probate — Code Civ. Pro. § 1861, subd. 2 — Decedent Estate Law, §§ 200(2), 206, added by Laws of 1920, chap. 919.

Under the full faith and credit clause of the Federal Constitution, as now interpreted, every state has exclusive jurisdiction over property within its borders, and where a testator has property in more than one state, each state in its own

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courts can provide for the disposition of the property, in conformity with its laws.

Where the will of a non-resident of this state, relating to personal property only, is valid under the laws of the state of Virginia in which it was executed, it may be established by an action in the Supreme Court of the state of New York though it is not entitled to be admitted to probate here. (Code Civ. Pro. § 1861, subd. 2; Decedent Estate Law, §§ 200(2), 206, added by Laws of 1920, chap. 919.)

Where testator and his second wife were domiciled in the state of Ohio until shortly before his death there and said will could not be proved in that state against her objection because it was holographic, and for the reason that it offended the community law of that state, her *ex parte* administration proceedings therein gave the Ohio court plenary jurisdiction over all assets the decedent left in that state.

In an action by stockbrokers who held an account in favor of decedent to establish his holographic will executed in and valid under the laws of the state in which it was made, plaintiff interpleaded as defendants the Ohio administratrix as well as the executor, legatees and next of kin, viz., mother and brother, under decedent's said will, which had been admitted to probate in the state of North Carolina, where decedent was born. Several months after decedent's first wife had obtained, in West Virginia, a decree of absolute divorce but before the entry of the final judgment, decedent married his second wife and shortly after her appointment as administratrix, the mother and brother of decedent proved *ex parte* in North Carolina his holographic will, which left everything to them. *Held,* that the North Carolina court was without jurisdiction to admit the will to probate and that plaintiff was entitled to judgment establishing said instrument as the last will and testament of decedent.

ACTION for interpleader.

Millard F. Tompkins, for plaintiffs.

Harold Remington, for defendant Clara Mae Blackburn.

John M. Harrington, for defendants Leonard A. Blackburn and Nannie Vaughn Blackburn.

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GUY, J. Action for an interpleader. Plaintiffs were stockbrokers who held an account in favor of decedent, Samuel L. Blackburn, for $20,227.68, and $600 second Liberty Loan bonds. They interpleaded as defendants decedent's Ohio administratrix, his second wife, as well as his executor, legatees and next of kin, viz., mother and brother, under his holographic will, which was admitted to probate in North Carolina. Decedent was born in North Carolina; he married his first wife in 1906, and she obtained an absolute divorce from him in West Virginia on November 24, 1914. On September 19, 1914, two months before the entry of the final judgment of divorce, decedent married his second wife. His Virginia holographic will recognized her as his wife, and a valid common-law marriage is thereby proved. The evidence convincingly establishes that the decedent and his second wife were domiciled and lived together until some months before his death in Cleveland, O., and that the decedent was domiciled in the state of Ohio at the time of his death. The will sought to be established in this action could not be proved in the state of Ohio because it is holographic; its provisions also offended the community property law of the state of Ohio. Immediately after his death on February 27, 1919, and on March 4, 1919, decedent's second wife was appointed *ex parte* as his administratrix in Ohio, and as such took possession of all his assets to be found in Ohio. Her petition alleged decedent left no next of kin and that his entire estate did not exceed $4,500. Shortly thereafter, and on March 10, 1919, his mother and brother proved *ex parte* in North Carolina his holographic will, which left everything to them. The prior Ohio administration, if *Roderigas* v. *East River Savings Institution,* 63 N. Y. 460, 466, 467, had not been overruled, would have been final and conclusive on the whole world that

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the decedent died intestate; also that the Ohio administratrix was entitled to the whole personal estate wherever situated. But in *Scott* v. *McNeal,* 154 U. S. 34, 43, 46, the *Roderigas* case was overruled. The full faith and credit clause of the Federal Constitution is under the guardianship of the United States Supreme Court, and it is the duty of all state courts to follow its rulings. The full faith and credit clause of the Federal Constitution is now interpreted to mean that every state has exclusive jurisdiction over property within its borders, and where testator has property in more than one state, each state has jurisdiction over the property within its limits and can in its own courts provide for the disposition thereof in conformity with its laws. *Brown* v. *Fletcher's Estate,* 210 U. S. 82, 89–90; *Iowa* v. *Slimmer,* 248 id. 115; *Thormann* v. *Frame,* 176 id. 350, 353–356. In overruling the *Roderigas* case the Supreme Court of the United States followed the views of the House of Lords. *Coucha* v. *Coucha,* 11 App. Cas. 541, 551–554, 564, 572. As the highest court of the British Empire has found it impossible to make a probate decree conclusive outside of the jurisdiction of the local government wherein it was rendered, the ruling of the United States Supreme Court adopting that rule here, contrary to the former and overruled practice of this state, is now the law of New York and of every other state. Under the law of New York a will of personalty executed by a non-resident in the manner required by the laws of another state in which such will was executed (Virginia), may be established here by action if the case is not one where the will can be admitted to probate in a Surrogate's Court under the laws of this state. Code Civ. Pro. § 1861, subd. 2; Decedent Estate Law, §§ 200 (2), 206, added by Laws of 1920, chap. 919. The will sought to be estab-

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lished in this action disposed of personalty only; was valid under the laws of Virginia, where it was executed, and could not be probated in the Surrogate's Court under the laws of this state, and therefore can be established by action in the Supreme Court of this state. Inasmuch as the holographic will could not have been proved in Ohio against the wife's objection, her *ex parte* administration proceedings in Ohio gave the Ohio court plenary jurisdiction over all property which the decedent left in Ohio. The evidence establishes that at the time of his death the decedent was a resident of and domiciled in the state of Ohio, and the court of the state of North Carolina which admitted decedent's will to probate was without jurisdiction to admit said will to probate. The second counterclaim of defendants Leonard A. Blackburn and Nannie Vaughn Blackburn is dismissed. The motion of defendant Clara Mae Blackburn, individually and as administratrix, to amend her pleadings to conform with the proof by inserting three additional paragraphs at the end of her answer and counterclaim, to be numbered paragraphs 11, 12 and 13, as set forth in notice of said motion, is hereby granted. Judgment is directed establishing the holographic will of decedent as his last will and testament, with costs to all parties appearing individually by separate attorneys.

Judgment accordingly.

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CHARLES W. MOODY, Plaintiff, v. FANNIE SOPER, Defendant.

(Supreme Court, Monroe Equity Term, December, 1921.)

Divorce — decree of divorce in Pennsylvania, the last matrimonial domicile of parties, in which action plaintiff in this action was served by mail, is valid and a bar to an action for divorce in this state.

In a husband's action for an absolute divorce it appeared that the last matrimonial domicile of the parties, who had many times been separated, was in the state of Pennsylvania. The evidence was clear that when the defendant, who worked and supported the children, came to the city of Rochester, N. Y., she intended to stay there permanently, only in the event that plaintiff provided a proper home for her there, which he never did. It further appeared that soon after her return to the state of Pennsylvania she obtained a divorce there, in which the defendant in the action was served with process by mail. She returned to the state of New York and married again. Upon directing judgment dismissing the complaint and awarding to her the custody of the children, *held*, that the Pennsylvania divorce was valid and will be given full force and effect in this state.

An allegation in the complaint for a separation brought by her in the state of New York that she was a resident of that state, was not sufficient to show that she had abandoned her domicile in Pennsylvania.

ACTION for absolute divorce.

Frederick A. Mann, for plaintiff.

Milton Noyes (Claude T. Taggart, of counsel), for defendant.

CUNNINGHAM, J. The plaintiff and defendant were married in New York state on June 27, 1915. There are two children, the issue of the marriage, both sons, one five years of age and one three years of age. On

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August 7, 1920, defendant brought an action in Pennsylvania for a divorce from plaintiff. The plaintiff, who was then in Rochester, N. Y., was not personally served with the process in that action, but the same was served on him by mail. On April 4, 1921, a decree was granted in that action, divorcing defendant from plaintiff. On April 16, 1921, defendant was married at Rochester, N. Y., to John Soper and has lived with him ever since as his wife. The plaintiff claims that the Pennsylvania divorce was void and is of no effect in this state and that the marriage contracted between the defendant and John Soper is invalid and that the defendant has been living in adulterous intercourse with John Soper. The question, therefore, to be determined in this case is as to whether or not the Pennsylvania divorce is valid.

The plaintiff is a barber by trade and is of a roving disposition and not inclined to remain settled in one place for any length of time. The plaintiff, either through inability or laziness, was not able to provide a home for his wife and children and to properly support and maintain them. Many times during their married life the plaintiff and defendant were separated and the mother worked and supported herself and the children. For the two years previous to March, 1920, plaintiff and defendant lived in the state of Pennsylvania, some of the time on a farm with defendant's mother in Athens, some of the time in Sayre and some of the time in Le Raysville. During a portion of the time the parties were in Pennsylvania they were not living together, but the wife worked and supported herself and the children. During the last seven months of their stay in Pennsylvania they lived together in Le Raysville, but came to the conclusion that plaintiff could not earn enough money in that village to support his family and they agreed to

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come to Rochester to see if plaintiff could find a position and provide a home for his family. On March 22, 1920, defendant left Le Raysville and came to Rochester with her two children and went to the home of plaintiff's mother, who conducted a rooming house. On March 15, 1920, plaintiff left Le Raysville, arrived in Rochester the following day and went to his mother's house. Plaintiff and defendant stayed at that house that night, but occupied separate rooms, and defendant left next day, being ordered out by her mother-in-law. She took with her the younger child, but her husband and mother-in-law would not permit her to take the older one. She stayed about a week at a friend's house and then went to her father's home in Rochester.

On the 23d day of March, 1920, defendant commenced an action for separation against plaintiff in the Supreme Court of this state. In the complaint in this action she alleged that she was "at the time of the commencement of this action a resident of the State of New York." As a result of that action plaintiff and defendant, on the 21st day of April, 1920, entered into an agreement in which they agreed to live apart; that the wife should have the custody of the two children and that the husband should pay twenty-five dollars per month for the support and maintenance of his wife and children. Plaintiff did not make all the payments specified in the separation agreement and defendant, about the 1st of June, 1920, returned to Pennsylvania and went to work to support herself and her children. The following August she commenced an action in Pennsylvania for a divorce.

The question now arises as to whether the domicile established by the plaintiff and defendant in the state of Pennsylvania had been abandoned at the time

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defendant commenced her action for divorce in that state. "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. * * * The existing domicile, whether of origin or selection, continues until a new one is acquired * * *." *Matter of Newcomb*, 192 N. Y. 238.

It cannot be disputed that the last place in which plaintiff and defendant lived together as husband and wife was in the state of Pennsylvania and that was their last matrimonial domicile. When the defendant left Pennsylvania and came to Rochester in March, 1920, she did not intend to change her permanent home unless the plaintiff succeeded in getting work and provided for the support and maintenance of herself and children in the new locality. She intended to stay in Rochester permanently only in the event that plaintiff provided a proper home for her in that city. As he never did so, it cannot be said that defendant while living in Rochester did so with the intention of making that city her permanent home. As a matter of fact, when the separation agreement was signed, she told plaintiff's attorney that she intended to return to Pennsylvania, thus clearly showing her intention to retain her domicile in that state.

When she commenced the separation action in this state in March, 1920, she did so for the purpose of regaining possession of her older child, from whom she had been forcibly separated for upwards of a month. Great stress is laid upon the fact that in the complaint in that action she alleges that she is a resident of the state of New York. It is true that at the time she was living in the state of New York, but only temporarily, waiting to see whether her husband could find a job and provide a home for her and her children. I do not think that this allegation in the

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complaint is sufficient to show that defendant had abandoned her domicile in Pennsylvania.

When defendant returned to Pennsylvania in June, 1920, she did so in good faith and for the purpose of supporting herself and children at a place where she had worked before. She did not leave this state for the purpose of evading its laws and securing a divorce in another state upon a ground which would not entitle her to a divorce in this state.

The last matrimonial domicile of plaintiff and defendant was in the state of Pennsylvania and, under the evidence, I must hold that defendant did not abandon such domicile and did not cease to be a resident of the state of Pennsylvania, and that, at the time of the commencement of the action in Pennsylvania, she had been a resident of that state for more than one year.

Under such circumstances, the Pennsylvania decree of divorce is valid and must be given full force and effect in this state. *Atherton* v. *Atherton,* 181 U. S. 155; *Thompson* v. *Thompson,* 226 id. 551; *Post* v. *Post,* 149 App. Div. 452; affd., 210 N. Y. 607; *Schenker* v. *Schenker,* 181 App. Div. 621; affd., 228 N. Y. 600.

I am of the opinion that it is for the best interests of the children that they should be placed in the custody of their mother. Plaintiff, during a large portion of his married life, was unable to provide a home for his children or to properly support and maintain them and there is no reason to suppose he will be able to do so in the future. If he were given the custody of them it is probable they would be placed in some institution or become public charges. The mother has always been tender and loving in her care of them and has worked hard to keep them in food and clothes, and I believe that they will be better provided for if

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they are left with her than if the custody of them were awarded to the father.

Judgment may be entered in favor of the defendant dismissing the complaint with costs and awarding the custody of the two children to defendant, requiring plaintiff to pay twenty-five dollars per month for their support and maintenance, with the privilege to plaintiff of visiting his children once a week.

Judgment for defendant.

ERSKINE HEWITT & Co., Plaintiff, *v.* THE FARMERS LOAN AND TRUST COMPANY, as Executor, etc., et al., Defendants.

(Supreme Court, New York Special Term, December, 1921.)

Infants — guardian — service of process — service on general guardian of property of non-resident infant insufficient — application for guardian ad litem denied as premature — Civ. Pr. Act, § 225.

The "guardian" specified in section 225 of the Civil Practice Act does not include a general guardian of the property of an infant, appointed by a decree of the Surrogate's Court.

An application, therefore, by such a guardian to be appointed guardian *ad litem* of a codefendant, an infant under the age of fourteen years, will be denied as premature, it appearing that service of the summons and complaint has not in fact been made on the infant by delivery thereof to said general guardian.

APPLICATION for appointment of guardian *ad litem* for infant defendant.

Geller, Rolston & Blanc, for petitioner.

BURR, J. The Farmers Loan and Trust Company, a defendant in this action, petitions this court that it be appointed guardian *ad litem* of Ann Cooper Hewitt,

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a co-defendant and infant under the age of fourteen years. The nature of the action is not stated in the petition. It appears from the petition that the petitioner was appointed general guardian of the property of the infant by decree of the Surrogate's Court of this county on the 11th day of October, 1921. That the petitioner is authorized by the laws of the state of New York to act as general guardian of an estate of an infant. It further appears that on the 21st day of October, 1921, service of the summons and a copy of the complaint was made upon said defendant Ann Cooper Hewitt, by delivery to petitioner as such general guardian of said infant of a copy of said summons and complaint. I am of the opinion on the record before me that service of the summons and complaint has not in fact been made on the infant by the delivery thereof to the petitioner who is general guardian of the property of the infant. The infant in this case resides without the state with her mother and I am of the opinion that the "guardian" specified in section 225 of the Civil Practice Act does not include a general guardian of the property but has reference to and would seem to especially indicate the person having physical custody of the person of such infant. The application is, therefore, denied as premature.

Application denied.

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Matter of FREDERICK HABERMAN, an Incompetent Person.

(Supreme Court, New York Special Term, December, 1921.)

Banks and banking — incompetent persons — trustees — savings bank account — ownership of fund in trust cannot be summarily determined by motion — bank book not produced.

Where a savings bank account stands in the name of "Rosie Haberman in Trust for Frederick Haberman," an incompetent, the court, on motion of his committee for an order directing the bank to pay over money to the credit of said account and claimed to belong to the incompetent, is without power to summarily determine that the money deposit was the property of the incompetent before deposit made by Rosie Haberman, his stepmother, that her act in depositing in trust was the act of a trustee or that the deposit "in trust for" entitles the incompetent to the fund.

MOTION for order directing payment of deposit.

Ira Maier, for petitioner.

Edward S. Clinch, for Harlem Savings Bank.

BURR, J. By this motion the committee seeks an order directing the Harlem Savings Bank to pay over certain money on deposit which it is claimed belongs to the incompetent person. The moving affidavit alleges that among the assets of the incompetent is a bank account in the Harlem Savings Bank upon which there is a balance to the credit of the incompetent in the sum of $582.74; that said account stands in the name of "Rosie Haberman in Trust for Frederick Haberman." Frederick Haberman is the incompetent person. Rosie Haberman is the stepmother of the incompetent. It is asserted that the stepmother of

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the incompetent herein recovered and collected the proceeds of a certain insurance policy upon the death of her husband, the father of the incompetent, and that the deposit in the savings bank represents the proceeds of such insurance policy belonging to the incompetent. That said deposit was made some seventeen years ago. The bankbook so far as the record shows is not in the possession of the committee nor is it shown that the bankbook was at any time delivered to the incompetent person either before or after the inquisition in lunacy. There are thus presented two propositions by this application of the committee. (1) That the money deposit was the property of the incompetent before deposit made by his stepmother, and her act in depositing in trust was the act of a trustee. (2) That the deposit "in trust for" entitles the incompetent to the fund. The savings bank opposes the application, and rightfully so. The relation between the bank and depositor is that of debtor and creditor. The bank is required under the Banking Law to exercise care to protect the funds of a depositor. The court will not on this application summarily determine whether or not the fund in question was in fact the money of the incompetent nor will it determine summarily whether or not the depositor has revoked the trust. The relation of debtor and creditor is between the bank and Rosie Haberman and in the payment of moneys in said bank the bylaws are part of the contract and the bankbook must be produced to entitle the depositor to such funds. In case of loss of the bankbook a remedy is provided for in the bylaws. In *Matter of Totten*, 179 N. Y. 112, it was held that "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative

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trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." See, also, *Matter of Perlman*, N. Y. L. J. Feb. 10, 1915, and *Ashley* v. *Excelsior Savings Bank*, Id. July 20, 1914. The court is without power summarily to determine either of the questions here presented. The committee would seem to have ample power to commence an appropriate action to recover the money in question, if he be so advised, but in that event the parties interested, to wit, the stepmother and the savings bank must be brought before the court and their respective rights passed upon in such an action. The motion must, therefore, be denied.

Motion denied.

PEOPLE ex rel. WILL WHITFIELD *v.* RICHARD E. ENRIGHT, Police Commissioner.

(Supreme Court, New York Special Term, December, 1921.)

Extradition — habeas corpus — criminal procedure — identity — constitutional law — regularity of process — when fugitive from justice will be surrendered — presumption as to discharge of official duties by executive — evidence — validity of indictment can be raised only on trial.

Where extradition papers are regular and contain a sufficient charge of crime, and it adequately appears that the relator is the person named in the indictment and that he was within the demanding state on the day stated in the indictment

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as the date of the crime, the governor of the state in which the fugitive is found, in the discharge of the imperative duty imposed by the Constitution of the United States, must surrender the fugitive into the custody of the agent of the demanding state.

Upon the return made to a writ of habeas corpus, that relator was held under and by virtue of a rendition warrant issued by the governor of the state of New York authorizing and commanding the arrest of relator and his surrender to the agent of the state of North Carolina, as a fugitive from its justice, the only questions before the court are whether the relator is unlawfully deprived of his liberty and whether the governor of this state in honoring the demand for relator's surrender, has acted without authority of law.

The relator is bound to overcome the presumption that the governors of the two states have performed their duties under the laws of the United States, and it is not enough for him to show that the indictment is defective under the laws of New York.

Where the name of the relator and that of the person named in the rendition warrant are identical, the presumption of *idem sonans* arises.

An extradition proceeding is a summary one to be kept within narrow bounds, and, where the papers required by the statute are in proper form, the only evidence admissible is such as tends to prove that the alleged fugitive from justice was not in the demanding state when the crime charged in the indictment against him is alleged to have been committed.

What motive induced the relator, a negro, to leave the state of North Carolina, the demanding state, is wholly immaterial, and even if it be assumed to be true that his only reason for leaving the state was because he was threatened with mob violence, he is none the less a "fugitive from justice" within the meaning of the constitutional and statutory provision concerning extradition.

The point that the indictment is invalid because, in violation of the Constitution of the United States and of the Constitution and laws of the demanding state, negroes were excluded from the grand jury which found the indictment, is a matter which can be raised only on the trial of the indictment.

Matter of Wood, 140 U. S. 278, followed.

WRIT of habeas corpus.

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Lavelle, Shields, Waring & Lovelace (Henri W. Shields, of counsel), for writ.

Edward Swann, district attorney, Felix C. Benvenga and John Caldwell Myers, opposed.

BURR, J. This is a writ of habeas corpus sued out in an extradition proceeding. The relator is a fugitive from the justice of the state of North Carolina, having been indicted in Onslow county, N. C., for the crime of assault with a deadly weapon with intent to kill, alleged to have been committed on January 6, 1921.

The return to the writ is that the relator is held in custody under and by virtue of a rendition warrant issued by the governor of the state of New York on July 9, 1921, authorizing and commanding the arrest of the relator and his surrender to the agent of the state of North Carolina.

The extradition warrant was issued by the governor of the state of New York pursuant to a requisition made by the governor of North Carolina. The requisition was accompanied by a copy of a bill of indictment which the governor of North Carolina certified was authentic and duly authenticated in accordance with the laws of the state of North Carolina. The governor of North Carolina also certified that the offense charged in the indictment was a crime against the laws of that state.

The relator has filed a traverse to the return setting up numerous grounds relied upon to sustain the writ of habeas corpus.

The indictment which accompanied the requisition is in due form and sufficiently charges the relator, Will Whitfield, with having committed a crime against the laws of North Carolina. The relator admits that his name is Will Whitfield, that he was within the state of

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North Carolina on January 6, 1921, the date on which the crime is alleged to have been committed, and that he subsequently left the state of North Carolina and came to the state of New York. This being so the state of New York is under the duty of surrendering the relator to the agent of the state of North Carolina.

In this proceeding the court can only inquire into the questions of whether there is a sufficient charge of a crime, whether the relator is the person named in the indictment and whether the relator was in the demanding state on the day that the crime is alleged to have been committed. No other questions can be raised or considered. Even if it be true, as asserted by relator in his traverse, that colored persons were excluded from the grand jury which found the indictment, that the relator left the state of North Carolina to escape mob violence and that there is danger that he will not have a fair trial if he is surrendered to the North Carolina authorities, those facts do not entitle him to relief on habeas corpus. The state of New York is under the duty of surrendering the fugitive to the agent of the state of North Carolina and the rendition warrant of the governor of New York must be executed for that purpose. U. S. Const. art. IV, § 2; U. S R. St. § 5278; Code Crim. Pro. § 827; *Biddinger* v. *Commissioner of Police of the City of New York*, 245 U. S. 128; *Appleyard* v. *Mass.*, 203 id. 222, 227, 228.

When the papers are regular and contain a sufficient charge of crime and it sufficiently appears that the relator is the person named in the indictment and that he was within the demanding state on the day which the indictment alleges as the date of the crime, the governor of the state in which the fugitive is found is under the duty of surrendering the fugitive into the custody of the demanding state. This duty,

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which is imposed by the Constitution of the United States, is imperative.

The only questions before the court are whether the relator is unlawfully deprived of his liberty, and whether the governor of this state in honoring the demand of the foreign state has acted without authority of law. It is not enough for the relator to show that the indictment is defective under the laws of this state; he is bound to overcome the presumption that the governors of the two states have performed their duties under the laws of the United States. *People ex rel. Marshall* v. *Moore*, 167 App. Div. 478.

Upon petition by a person charged with being a fugitive from justice for a writ of habeas corpus, the identity of the name of such person with the name of the person named in the rendition warrant raises a presumption that the persons are the same. *People ex rel. Teitelbaum* v. *Ryan*, 181 App. Div. 404.

The proceeding is a summary one, to be kept within narrow bounds. When the extradition papers required by statute are in the proper form, the only evidence sanctioned by the United States Supreme Court as admissible is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed. *Biddinger* v. *Commissioner of Police of the City of New York*, 245 U. S. 128, 135.

The relator contends that he is not a fugitive from justice and, therefore, is not subject to extradition because he left the state for the purpose of avoiding mob violence. Even if it be assumed to be true that the relator did leave the state because he was threatened with mob violence and that that was his only reason for leaving, he is none the less a fugitive from justice within the meaning of the constitutional and statutory provisions concerning extradition.

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In *Biddinger* v. *Police Commissioner, supra,* it was held "That a person indicted in due form for an offense against the laws of a State, who was present in that State at the time when the offense is so alleged to have been committed and subsequently leaves it, becomes, within the meaning of the Federal Constitution and laws, a fugitive from justice."

And it is wholly immaterial what motive induced the departure. *Drew* v. *Thaw,* 235 U. S. 432, 439. See, also, *Appleyard* v. *Mass.,* 203 U. S. 222.

The relator in this proceeding is a negro. It is contended that the indictment is invalid because in violation of the Constitution and laws of the state of North Carolina and in violation of the Constitution and laws of the United States negroes were excluded from the grand jury which found the indictment.

This point cannot be raised in this proceeding. It is a matter which the defendant can raise only in the courts of the state of North Carolina when he is brought to trial there under the indictment which is the basis for his extradition.

In *Matter of Wood,* 140 U. S. 278, the court laid down the following rules: "When the statutes of a state do not exclude persons of African descent from service as grand or petit jurors, a person accused in a state court of crime, who desires to avail himself of the fact that they were so excluded in the selection of the grand jury which found the indictment against him, or of the petit jury which tried him, should make the objection in the state court during the trial, and, if overruled, should take the question for decision to the highest court to which a writ of error could be sued out from this court; and failing to do so, he cannot have the adverse decision of the state court reviewed by a Circuit Court of the United States upon a writ of habeas corpus."

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It is true that the *Wood* case was not an extradition proceeding, but the principle upon which the decision in that case was based was that an objection to an indictment on the ground that persons of African descent were excluded from the grand jury can be raised only in the trial court.

The courts of this state cannot undertake to sit in judgment upon the methods or procedure followed in a sister state in administering the laws of the sister state. Any objection to such methods and procedure must be made in the courts of the sister state.

It must be assumed that relator will have a fair trial in North Carolina.

Relator contends that he should not be surrendered to the agent of the state of North Carolina because he will be in danger of mob violence there and if brought to trial will not have a fair trial.

This court cannot go into that question in this proceeding. The courts of this state cannot impugn the motives of the authorities of the state of North Carolina by conducting an inquiry into the question of whether the fugitive will be accorded protection and given a fair trial in that state. We are *bound* to assume that the authorities of the state of North Carolina will do their full duty to the prisoner, will give him ample protection and accord him all his legal rights. We are not dealing here with a foreign power but with a sister state of the Union whose sovereignty is equal to our sovereignty, and who is entitled to our full confidence. See *Marbles* v. *Creecy*, 215 U. S. 63; *Commonwealth* v. *Philadelphia Prison*, 220 Penn. St. 401; *Ex Parte Swearingten*, 13 S. C. R. 74; 2 Moore Extradition, § 617; *People ex rel. MacSherry* v. *Enright*, 112 Misc. Rep. 568.

Writ dismissed.

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PEOPLE ex rel. MARCI v. HANLEY, as Warden, etc.

(Supreme Court, New York Special Term, December, 1921.)

Criminal procedure — sentence — habeas corpus — defendant cannot show on habeas corpus a change in the decision of the magistrate in imposing sentence — judgment of commitment reviewable by appeal only — city of New York — Inferior Criminal Courts Act, § 88(3).

Under section 88(3) of the Inferior Criminal Courts Act, a magistrate in the city of New York, upon convicting a defendant of disorderly conduct, may lawfully impose a sentence of six months in the workhouse, and a warrant of commitment reciting such a sentence is a final judgment, reviewable only by an appeal.

A defendant so convicted and sentenced is precluded from showing on habeas corpus that the magistrate, after sentencing him to pay a fine and serve three months in the penitentiary, changed the decision and imposed the sentence recited in the warrant of commitment, and the writ of habeas corpus will be dismissed and relator remanded.

HABEAS corpus.

Meyer Greenberg, for relator.

Edward Swann, district attorney, and Michael J. Driscoll, deputy assistant district attorney, opposed.

BURR, J. This is a proceeding instituted on a writ of habeas corpus obtained by the relator, Marci, directed to the warden of the city prison. The warden has duly made a return to the said writ which states in substance that the relator was convicted by City Magistrate Sweetser on the 4th day of October, 1921, for the offense of disorderly conduct, pertaining to a breach of the peace, and was sentenced to the workhouse for a period of six months.

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The relator raises an issue concerning an alleged endorsement on the affidavit for the offense of disorderly conduct to which he pleaded guilty. Relator contends that he was sentenced to pay a fine of fifty dollars and to serve three months in the penintentiary and that thereafter the city magistrate changed this decision and sentenced him to a term of six months in the workhouse.

The relator is precluded from going behind the commitment of the magistrate. That is the final determination of the issue. The warden holds the relator by virtue of such commitment.

A warrant of commitment of an inferior court is conclusive and the facts may not be inquired into. *People ex rel. Smith* v. *Van De Carr,* 86 App Div. 9, 13; *People ex rel. St. Clair* v. *Davis,* 143 id. 579.

Section 88, subdivision 3, of the Inferior Criminal Courts Act of the City of New York concerning a commitment of persons convicted of disorderly conduct provides: "The magistrate may commit such person, whether male or female, in the boroughs of Manhattan, Brooklyn, Queens and The Bronx, to the workhouse on Blackwell's Island, and in the borough of Richmond to the said workhouse or to the county jail, for a definite term not exceeding six months."

It is, therefore, evident the city magistrate had jurisdiction to commit relator to the workhouse for a period of six months. The relator being committed by a final order of a court of competent jurisdiction the writ of habeas corpus will not lie. See Code Civ. Pro. § 2016, subd. 2; Civil Practice Act, § 1231, subd. 2.

A commitment by a city magistrate having summary jurisdiction of an offense (disorderly conduct) is in itself a final judgment. *People ex rel. St. Clair* v. *Davis,* 143 App. Div. 579; *People ex rel. Kuhn* v. *P. E. House of Mercy,* 133 N. Y. 207; *Cohen* v. *Warden,*

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150 N. Y. Supp. 596; *People ex rel. Price* v. *Hayes*, 151 App. Div. 561; *Matter of Cropsey* v. *Tiernan*, 172 id. 435.

A writ of habeas corpus cannot be made to perform the function of a writ of error. Upon habeas corpus proceedings the court examines only the power and authority of the court to act, not the correctness of its conclusions. Relator's remedy, if any, is by appeal. *People ex rel. Hubert* v. *Kaiser*, 206 N. Y. 46; *Matter of Gregory*, 219 U. S. 210.

As the city magistrate had jurisdiction of the person and of the offense and had the authority to inflict the punishment, the writ of habeas corpus is dismissed and relator remanded to the workhouse under the judgment of conviction.

Writ dismissed.

HOPE CEMETERY ASSOCIATION, Plaintiff, *v.* ORRIN W. ROSE et al., Defendants.

(Supreme Court, Steuben County, December, 1921.)

Taxation — cemetery lands — former statute exempting land of cemetery association from local taxation, held repealed — description of property — assessment invalid — assessment of land including tax exempt cemetery property, exempts entire plot — assessors individually liable for taxes where assessment made without jurisdiction — exemption not lost by use of unoccupied portion for farming purposes — description — boundaries govern — Laws of 1896, chap. 908, § 4(7), amended by Laws of 1909, chap. 62; Laws of 1847, chap. 133, § 10; Laws of 1879, chap. 310.

Before the statute (Laws of 1896, chap. 908, § 4(7), now Laws of 1909, chap. 62, same section and subdivision) all lands of cemetery associations whether organized under chapter 133 of the Laws of 1847, or chapter 310 of the Laws of 1879, and whether actually used for cemetery purposes or otherwise were

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absolutely and entirely exempt from taxation, but by the addition of such changes in phraseology as were deemed necessary in rewriting the law, the entire law upon this subject was changed.

The statute (Laws of 1847, chap. 133, § 10) which expressly exempts from local taxation all cemetery lands of any association organized pursuant thereto is so inconsistent with the later statutes (Laws of 1896, chap. 908; Laws of 1909, chap. 62) that it must be conclusively deemed to have been repealed thereby though not expressly included in the repealing section of either of those statutes. It does not follow, however, that all land not actually occupied by graves is taxable.

In an action to recover money paid for taxes by a cemetery association organized under chapter 133 of the Laws of 1847 it appeared that the greater part of a tract of land purchased by the plaintiff years ago to be used as an annex to the cemetery grounds then owned by plaintiff in the city of Corning, N. Y., lies in about the same condition as when purchased. *Held*, that the right of such lands to exemption from taxation under the statute was not lost by proof that plaintiff in an endeavor to avoid unnecessary expenditure for care and upkeep derived some income from the use of the unoccupied part of its lands for farming purposes.

The local assessors in the *bona fide* belief that such lands were being so used and that plaintiff was reaping the incidental benefit, after consultation with the attorney-general and the officials of the state tax department, assessed said lands in 1914, 1915 and 1916 upon the tax rolls of the city in substantially this language: "Twenty acres on south side of City line, bounded north by City of Corning, south and east by land of Joel Wicks, and west by land of Robert O. Hayt." *Held*, that under the rule that where both quantity of land and specific boundaries are included in a description, the boundaries must govern, the assessment was in any event entirely without warrant of law.

The power to determine what property shall be exempted from taxation is vested solely in the legislature and the defendant assessors having assessed the entire tract, a part of which has been plotted and improved and is now occupied by graves, tombstones and similar memorials, and clearly exempt from taxation, the defendants are individually liable upon the ground that in making the assessments they acted without jurisdiction, and judgment is directed in favor of plaintiff.

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ACTION to recover taxes.

Francis C. Williams, for plaintiff.

Frank H. Hausner, for defendant.

SAWYER, J. Hope Cemetery is the main Protestant cemetery in the city of Corning and vicinity. It is owned and managed by this plaintiff, a corporation duly organized under chapter 133 of the Laws of 1847. Some years ago it purchased a tract of land of about thirty-three acres to be used as an annex to the cemetery grounds it then owned and managed and which in the passage of time had become well filled with graves. The land so purchased as yet lies in the same condition as when purchased except that about four or five acres in its northwest corner have been plotted and to some extent used as burial places, and a number of trees have been set out upon the land generally.

Prior to 1914 these defendants, who were then the assessors of said city of Corning, acting in the *bona fide* belief that the unimproved part of such lands were being used for ordinary farming purposes and that plaintiff was deriving an income therefrom, after consultation with the attorney-general of the state of New York and the officials of the tax department of said state, deemed them subject to taxation, and in the years 1914, 1915 and 1916 assessed them against plaintiff upon the tax rolls of said town of Corning in substantially this language: "Twenty acres on south side of City line, bounded north by City of Corning, south and east by land of Joel Wicks, and west by land of Robert O. Hayt."

Taxes were extended upon such assessments for each of those years, and remaining unpaid, the lands were afterwards sold for the collection thereof. From such tax sale plaintiff was subsequently obliged to

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redeem and now brings this action to recover from defendants individually the amount so paid upon the theory that same were exempt from taxation and defendants, therefore, without jurisdiction to include them in the town assessment-rolls. Section 10 of chapter 133 of the Laws of 1847 expressly exempts from such taxation all cemetery lands of any association formed pursuant to the act.

Between the year 1828 and that of 1889 no general revision of the Tax Law was had, and much confusion came to exist by reason of the fact that in the interim something more than 100 distinct laws bearing upon the subject, some general and some special, had crept into the statute books. In the latter year the legislature took the matter up for consideration with the result that after several abortive efforts the tax laws were entirely overhauled and codified by chapter 908 of the Laws of 1896, the preliminary examination and work having been done by a commission known as the statutory revision commission. This commission in its report, after pointing out sundry specific changes which had been made, stated it had made in addition such changes in phraseology as were necessary in rewriting the law; one of these so called changes in phraseology bears directly upon the instant controversy for after providing that the real property of a corporation or an association organized exclusively for various purposes, including cemetery purposes, shall be exempt from taxation (chap. 908, § 4, subd. 7) the act states that: "The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes, but leased or otherwise used for other purposes shall not be so exempt; but if a portion only of any lot or building of any such corporation or association is used exclusively for carrying

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out thereupon one or more of such purposes of any such corporation or association, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining portion of such lot or building to the extent of the value of such remaining portion shall be subject to taxation."

This quoted statute of 1896 has been carried into the present law (Laws of 1909, chap. 62) where it is to be found under the same section and subdivision number, and is now the law of the commonwealth. Such "necessary change in phraseology" changed the entire law upon this subject, for before its enactment all lands of cemetery associations, whether organized under the act of 1847 or that of 1879, and whether actually used for cemetery purposes or otherwise were absolutely and entirely exempt from taxation. *People ex rel. Oak Hill Cemetery Assoc.* v. *Pratt*, 129 N. Y. 68–74.

While not expressly included in the repealing section of either the Tax Law of 1896 or that of 1909, those acts are so inconsistent with section 10 of the Laws of 1847 that same must be conclusively deemed to have been repealed thereby. *Matter of Huntington*, 168 N. Y. 399; *Pratt Institute* v. *New York*, 183 id. 151; *People ex rel. Cooper Union* v. *Gass*, 190 id. 323; *Peterson* v. *Martino*, 210 id. 412.

It does not, however, follow that all land not actually occupied by graves belonging to such an association is taxable; neither does its subjection to that burden follow from the mere fact that it has some portion leased for monetary consideration. As I view it, such a corporation in order to gain the benefit of the exemption law is not obliged to permit its unoccupied land to remain uncared for, thus detracting from beauty of scene and surroundings desired by average persons for the final resting place of loved ones

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whose memory is still fragrant. Neither is such an association required to balance the difference between the cost of keeping its unoccupied grounds in order and the tax which would probably be assessed against them if use be made by sale or otherwise of their natural products, and act at its peril. It may on the contrary adopt such plan for keeping its unused lands in order as may be most advantageous from all standpoints, and its exemption is not lost even though it derive some benefit in addition to that coming from improved appearance. *People ex rel. Buffalo B. P. Assn.* v. *Stillwell,* 190 N. Y. 284. The last named action arose after the enactment of the Tax Law of 1896 and involved a question very similar to that here presented; Judge O'Brien, writing for the Court of Appeals, pointed out clearly and unmistakably the rule which is to be applied, having in view the change of the statute from an entire to a limited exemption, and it may not be amiss to quote his language: " The cemetery in question was, to use a business expression, a going and growing concern. It was not all occupied by burial plots or by the graves of the dead. It may not be fully occupied for such purposes for many years to come. Of course, it is not necessary that the cemetery should be filled with graves in order to be entitled to the exemption, and the mere fact that Brennan had leased an unoccupied portion of the cemetery for a sum of one hundred and twenty-five dollars would not necessarily deprive the relator of the exemption. If, for example, he had paid that sum of money for the right to cut and carry away the grass from the unoccupied land, and the money paid by him went into the relator's treasury to be used for taking care of the ground already occupied, that would not change the character of the land as cemetery land, nor deprive the corporation of the

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benefit of the exemption. We do not know what the real facts are in regard to this leasing and occupation, * * *. Of course, if the relator has leased the land for farming purposes and it is used in the ordinary way as farmers use their land * * * the case might be different, and under such circumstances the land ought to be taxed and would be taxable. Hence, the real facts that relate to the leasing and occupation must be found before we can say that the relator is not entitled to the exemption." P. 291 *et seq.*

In other words, the question as to whether such lands are under the present statute taxable or exempt from taxation depends always upon the facts surrounding their user. In the case at bar this question was most earnestly litigated and upon such controverted question of fact I am inclined to believe that the plaintiff did not hold and use its unoccupied lands as a business or money making proposition, but that it had endeavored to avoid unnecessary expenditure for their care and upkeep; at the same time reaping such incidental benefit as might come therefrom. This conclusion is not weakened or altered by the fact that in one year a small portion of the land was cultivated upon shares through an arrangement unknown to its officers with plaintiff's caretaker. In other words, I am led from the testimony to believe that such use as the plaintiff has made of the lands has not caused them to lose their exemption from taxation. In this conclusion no consideration is given to the fact that the assessments complained of, while stated to cover twenty acres of land, are described by boundaries in such manner as to include the entire tract. As has been said, some four or five acres of this land have been plotted and improved and are now occupied by graves, tombstones, and similar memorials. The well understood rule is that where both quantity of land

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and specific boundaries are included in a description, the boundaries must govern; it would appear from this that the assessments complained of were in any event entirely without warrant of law.

This brings us to another question which is sharply presented and has been elaborately argued. Recovery is sought against defendants individually upon the ground that in the making of the assessment in question they acted without jurisdiction and in violation of their duty. *Prosser* v. *Secor*, 5 Barb. 607; *Lapolt* v. *Maltby*, 10 Misc. Rep. 330; *N. Y. Milk Products* v. *Damon*, 57 App. Div. 261; *Mygatt* v. *Washburn*, 15 N. Y. 316; *Dorwin* v. *Strickland*, 57 id. 492; *Hilton* v. *Fonda*, 86 id. 340.

The rule in this state seems that the duties of tax assessors, being *quasi* judicial in character, if they keep within their authority and act honestly, and in good faith, and with a common degree of care and prudence they are not answerable in damages for errors, mistakes, inaccuracies or bad judgment in assessments. This is sustained by a long line of authorities, beginning with the construction of the revised statutes of 1828, and involving most if not all of the intermediate, special, and general statutes, the Tax Law of 1896, as well as that now in force known as chapter 60 of the Consolidated Laws. *Vail* v. *Owen*, 19 Barb. 22; *Brown* v. *Smith*, 24 id. 419; *Tucker* v. *City of Utica*, 35 App. Div. 173–176; *Board of Education* v. *Henderson*, 42 id. 237; *Swift* v. *Poughkeepsie*, 37 N. Y. 511; *Bell* v. *Pierce*, 51 id. 12; *Nat. Bank Chemung* v. *Elmira*, 53 id. 49; *U. S. Trust Co.* v. *Mayor, etc.*, 144 id. 488–492; *Elmhurst Fire Co.* v. *City of New York*, 213 id. 87.

It is not within the province of assessors to determine what property shall be exempt from taxation; that power is vested solely in the legislature, and if the assessors undertake to subject to taxation prop-

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erty made by it exempt, they are acting without jurisdiction, and are personally liable in the same manner as for assessment against one not a taxable inhabitant of their subdivision. Where, however, the statute provides that property may or may not be exempt as circumstances existing at the time of the assessment may be, leaving it to the assessors to determine the fact, in making such determination they act judicially, and within the scope of their authority. Their decision is not conclusive, but in its making they act judicially and are protected from personal responsibility precisely the same as they are in case of mistaken judgment as to value; the distinction is found in the difference between illegal and erroneous assessment; where no power is given them to assess, they are personally responsible. Where they may or may not assess, a decision upon their part may be erroneous, but it is not illegal, and no personal responsibility can be predicated thereon.

From what has been said it follows that these defendants in passing upon the question as to whether that portion of plaintiff's lands not plotted and opened for cemetery purposes were subject to taxation would have been engaged in a judicial act for which they are not personally responsible even though mistaken in their conclusion. Unfortunately they have assessed the entire tract, not only that the exemption of which they were required to determine, but as well that which is clearly exempt. The nature of the assessment is such that there can be no division between responsibility and nonresponsibility, and they are not sheltered by the rule above stated.

Defendants' preliminary motions are denied with exception and judgment directed for plaintiff, with costs.

Ordered accordingly.

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LUDOVIC PIGNATELLI, Plaintiff, *v.* NEW YORK TRIBUNE, INC., Defendant.

(Supreme Court, Kings Special Term, December, 1921.)

Libel — publication of newspaper articles indicating plaintiff's disinclination to work — ridicule — defendant's motion for judgment on pleadings denied.

Where the publication in a daily newspaper of two articles written of and concerning the plaintiff, the Prince d'Aragon, an ancient, noble and honorable family of Spain, indicating a disinclination on his part to avail himself of the opportunity to work which had been provided for him, may have tended to subject him to public ridicule and scorn, defendant's motion for judgment on the pleadings on the ground that neither of the articles is libelous *per se* and that in the absence of an allegation of special damage the complaint is fatally defective, will be denied.

MOTION for judgment.

Patterson & Brinckerhoff (John Patterson, of counsel), for plaintiff.

Sackett, Chapman, Brown & Cross (Harold L. Cross, of counsel), for defendant.

DIKE, J. This is a motion for judgment in an action for damages for alleged libel, two causes of action being set forth in the complaint, the defendant attacking each separately and contending that neither of the articles is libelous and, therefore, there being no allegation of special damages that the complaint is fatally defective.

Unless the two articles in question are not libelous *per se,* the defendant should prevail upon this motion. It is necessary, therefore, to examine the complaint to

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discover if there are any peculiar features in this action, any personal element of the case, that calls for the application of any special rule. The complaint avers "that the plaintiff is of so-called noble birth, being the Prince d'Aragon, an ancient, noble and honorable family of Spain," having been a resident of the United States for ten years where "it is his intention to reside for the purpose of leading a modest and quiet life of independence, industry and democracy." The defendant newspaper contained in its issue of January 30, 1921, an article referring to the plaintiff herein with the headline: "Prince jumps job as carpet layer for hotel here," the message purporting to come from Atlantic City, "Titled son-in-law of G. Jason Waters revolts against work and retires to his Long Island estate." The special dispatch to the *Tribune* says in part, "Prince Ludovic Pignatelli d'Aragon is in revolt against work. Today it became known here that the descendant of a great house of Spain had defied his democratic father-in-law, G. Jason Waters, managing director of the Ambassador chain of hotels, and left the job," continuing as set forth in the moving papers herein. Again in a second dispatch purporting to come from Atlantic City on January 31, 1921, bearing headline, "Waters is through with Prince. Sorry he will not work. Head of Ambassador hotels says he tried in vain to make businessman of titled son-in-law," quoting the conversation with Waters to the effect "I'm sorry, but it is true that my titled son-in-law will not work. I am through with him;" and again later, "It was not a menial position, as I saw it reported in some newspapers. It was a good job with a good chance to go ahead. He lasted just one week, then he beat it back to Long Island," and continuing as set forth in the papers submitted herewith.

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Did these two articles, as they appeared in the daily publication of the defendant, hold the plaintiff up to public ridicule, contempt and scorn, and has he been made ridiculous and contemptible in the community and at all places where said publication was circulated, which is the effect of the articles as complained of in the complaint?

It may be necessary in deciding this motion, to examine the personal element as we may learn of it in the complaint. In Europe a so-called "leisure class" exists, and in no inconsiderable number, which in this country, compared with its population, is a very inconsiderable number. We are a nation of workers. It is the habit of Americans to work. Few sons of rich men here are drones. Many are in fact tireless workers. The men here who have nothing to do or other serious occupation save to worry over the inroads of the state and federal taxes upon their fixed incomes are comparatively a small number. But the plaintiff is of foreign birth. He has been brought up in a different environment, unquestionably a member of this leisure class in his own country. The two articles in question as published by the defendant would indicate a disinclination on the part of the plaintiff to avail himself of the opportunity of work which had been provided for him. The American residents of this country are credited with a delicate sense of humor. To the great majority here the episode as set forth by the defendant may have made of him, as he claims, an object of ridicule to the readers of this great daily. It is not the sting that he may have felt, it is the effect on the readers of the defendant that is the essential element. "Cervantes smiled Spain's chivalry away," a great Englishman said of a great Spaniard. Jenks, J., in the case of *Cohan* v. *New York Times Co.*, 153 App. Div. 242, on page 247, after dis-

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cussing certain cases said: "For in each of them there was not publication of a mere matter of news, but the incident was used, not alone to point a moral, but to adorn a tale, narrated in a sensational vein, and there was presented the feature well described by Barrett, J., in *Moffatt* v. *Cauldwell,* 3 Hun, 26: 'It comes to this, that the question, whether or no the matter is libelous, so as to be actionable, depends upon the style, scope, spirit and motive of every such publication, taken in its entirety.'" And again in the case of *Church* v. *Tribune Assn.,* 135 App. Div. 30, the court said: "The language of the article is, of course, to be read and construed fairly and naturally, and the test whether it is or is not libelous *per se* is whether to the mind of an intelligent man the tenor of the article and the language used naturally import a criminal or disgraceful charge." This, it seems to me, is an extreme case. This law, of course, is perfectly sound; but the element of ridicule also may be equally important. The test here must naturally be: Was the plaintiff exposed to ridicule in such wise that his reputation was injured. Ridicule in and of itself, if it has harmful results, is sufficient. And these articles which may have naturally affected the risibility of readers may have attained wider notice because of the title borne by the plaintiff. This is the misfortune of the plaintiff in this affair and the penalty of being a prince. Whether the articles in question tended to subject the plaintiff to ridicule or contempt is the crux of the case. It is natural that the newspaper should be afforded generous scope to fairly and entertainingly report an incident, being mindful, however, that the particular case does not bring them within the prohibited limits and lay them open to a charge of libel. Mr. Newell, in his work on Slander and Libel, says: "While the public press cannot with

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impunity ruin or affect a man's fair name or his affairs under the guise of joke or jest, on the other hand it need not be debarred from all humor, even of a personal kind that begets laughter and leaves no sting, otherwise its columns might become almost as dull as the pages of *The Gazette.*"

I hesitate to rule in any way that would tend to lessen the entertaining qualities of the defendant newspaper, but it seems to me that following *Moffatt* v. *Cauldwell, supra,* " the style, scope and spirit of the articles " as published by defendant taken in their entirety, make them libelous by fair and natural construction. *Triggs* v. *Sun Pub. Co.,* 179 N. Y. 144.

I am forced to the conclusion that the articles in question come within the prohibition of ridicule and contempt and I am constrained to deny the motion with ten dollars costs.

Motion denied.

JULIAN P. FAIRCHILD and Others, as Permanent Receivers of ATLANTIC DOCK COMPANY, Plaintiffs, *v.* UNION FERRY COMPANY OF NEW YORK AND BROOKLYN, Defendant.

(Supreme Court, Kings Special Term, December, 1921.)

Venue — change of place of trial — land under water — boundary line between New York and Kings counties is actual line of low water on Brooklyn side — where property situate in two counties action may be brought in either county — Civ. Pr. Act, § 183.

The boundary between the counties of New York and Kings is the actual line of low water on the Brooklyn side whether corresponding with the original low water line of the East river shore or varied by permanent encroachment of docks, piers and wharves.

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A complaint after describing water front property located at and in the vicinity of the foot of Hamilton avenue, borough of Brooklyn, owned by plaintiffs and defendant, respectively, alleged that defendant maintains a ferry house and appurtenances at the foot of the avenue, and that the rack on the southerly side of its ferry slip was within ten feet of plaintiffs' pier, that defendant's structures deprived plaintiffs of the use of their bulkhead and along the northerly side of their pier and that said structures constitute a public nuisance which particularly injures and violates plaintiffs' property rights. *Held*, that under the decisions establishing the boundary line between the counties of New York and Kings, plaintiffs' bulkhead and pier are in Kings county and the land under water in the southerly view of defendant's ferry slip and on and over which its rack is maintained in New York county.

Both properties together are to be regarded as the "subject of the action" within the meaning of section 183 of the Civil Practice Act and the venue of the action is properly laid in Kings county. A motion by defendant for an order changing the venue to New York county, based upon the provisions of said section 183, denied.

MOTION for change of place of trial.

Cullen & Dykman (Francis L. Durk, of counsel), for plaintiff.

Forster, Hotaling & Klenke (George P. Hotaling, of counsel), for defendant.

DIKE, J. The motion of the defendant herein is for an order changing the venue to New York county from Kings county, and is based upon provisions of section 183 of the Civil Practice Act, formerly section 982 of the Code of Civil Procedure.

The complaint after describing the water front properties owned by the plaintiffs and defendant respectively, which are located at and in the vicinity of the foot of Hamilton avenue, borough of Brooklyn, alleges that the defendant maintains a ferry house

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and appurtenances at the foot of said avenue, and that the rack on the southerly side of its ferry slip was within ten feet of plaintiffs' pier, that defendant's structures deprive the plaintiffs of the use of their bulkheads and along the northerly side of their pier and that these structures constitute a public nuisance which particularly injures and violates plaintiffs' property rights. Judgment is demanded that defendant be enjoined from maintaining the rack, ferry house and appurtenances alongside and in front of plaintiff's bulkhead and pier, and also asking for damages.

It is established by a large number of cases that the boundary between the counties of New York and Kings is the actual line of low water on the Brooklyn side, whether corresponding with the original low water line of the East river shore or varied by permanent encroachment of docks, piers and wharves. *Orr* v. *City of Brooklyn*, 36 N. Y. 661; *Atlantic Dock Co.* v. *City of Brooklyn*, 3 Keyes, 444; *Tebo* v. *City of Brooklyn*, 134 N. Y. 341; *Oakley* v. *Gardiner*, 78 Hun, 138. Under these decisions plaintiffs' bulkhead and pier are in Kings county, and the land under water in the southerly view of defendant's ferry slip and on and over which its rack is maintained is in New York county.

The facts of the situation are not sufficiently disclosed upon this motion for the court to determine whether or not the ferry house and other structures of which plaintiffs complain are, under those decisions, in New York county. It will be sufficient, however, for the purpose of argument, that all of defendant's structures are in that county.

Section 183 of the Civil Practice Act reads as follows:

"Place of trial of real property action.

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"Each of the following actions in the supreme court must be tried in the county in which the subject of the action or some part thereof is situated:

"1. An action of ejectment;

"2. For the partition of real property;

"3. For dower;

"4. To foreclose a mortgage upon real property, or upon a chattel real;

"5. To compel the determination of a claim to real property;

"6. For waste;

"7. For a nuisance;

"8. To procure a judgment directing a conveyance of real property;

"9. Every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real."

The phrase "subject of the action or some part thereof" as used in this section means the real property concerning which judgment may be rendered in the action. The gravamen of the cause of action alleged in the complaint is that the proximity of the ferry structures maintained by the defendant interferes with the access to plaintiffs' pier and bulkhead. The relative rights as to the uses of real properties adjacent or in proximity to each other are involved and consequently both properties will be affected by the judgment.

It seems to me, therefore, that both properties together are to be regarded as the "subject of the action," within the meaning of section 183 of the Civil Practice Act, and that the action may be properly brought in the county in which either property is located. *Litchfield* v. *International Paper Co.*, 41

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App. Div. 447; *Smith* v. *Van Veghten,* 184 id. 813. The case of *Horne* v. *City of Buffalo,* 49 Hun, 76, to which the attention of the court is called by defendant's counsel, although an action for nuisance, was not an action relating to real property and it would seem that the majority of the justices did not concur in the opinion therein. Plaintiffs' real property is located in Kings county and, being a part of the subject of the action, the venue is properly laid in that county.

Motion denied, with ten dollars costs.

ERNESTO STAGG, Plaintiff, *v.* BRITISH CONTROLLED OILFIELDS, LTD., Defendant.

(Supreme Court, New York County, December, 1921.)

Contracts—non-residents—attachment—jurisdiction of Supreme Court—General Corporation Law, § 47.

A written contract between plaintiff, a non-resident, and defendant, a foreign corporation, executed in the state of New York, contained the following provision: "First. It is agreed that while for convenience this agreement is signed by the parties in the City of New York, United States of America, it should be considered and held to be as one duly made and executed in London, England." *Held,* that under section 1780, subdivision 1, of the Code of Civil Procedure (now General Corporation Law, § 47) the Supreme Court of the state of New York has jurisdiction of the action and that a levy under a warrant of attachment of defendant's interest in certain options on oil properties in a foreign country will be upheld.

MOTION by defendant to vacate service of summons, warrant of attachment and levy.

Scott, Gerard & Bowers, for plaintiff.

Graham, McMahon, Buell & Knox, for defendant.

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MARTIN, J. This is a motion by defendant to (1) vacate the summons herein and the service thereof within the state; (2) to vacate and set aside a warrant of attachment; (3) to vacate a levy made under the warrant of attachment, and (4) to vacate the service of the summons and complaint upon the defendant without the state. Plaintiff is a non-resident and defendant is a foreign corporation. It appears that the alleged cause of action of plaintiff did not arise in the state of New York and that defendant is not doing business here. Though process was served upon an officer of defendant while he was in this state, defendant asserts there is no basis for finding that the said officer was here on business of defendant or that it was doing business within this state. That much must be conceded. It also asserts that the action affects the title to real property situated without the state; but that assertion is without merit. The action is to recover payments under a contract between the parties. Its subject matter is not the title to real property, even conceding that collaterally it may involve the same, and this does not appear from the affidavits. Defendant's argument is based mainly upon the contentions (a) that the court cannot take jurisdiction of the action; (b) that it ought to decline to take such jurisdiction, and (c) that there was not within the state any property of defendant on which the attachment could be levied. Plaintiff is a citizen of Ecuador. Defendant is a corporation organized under the laws of the dominion of Canada. Plaintiff declares upon an alleged breach of a contract which was made between the parties and executed in the state of New York, but which contains the following provision: "*First.* It is agreed that while for convenience this agreement is signed by the parties in the City of New York, United States of America, it should be considered and held

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to be as one duly made and executed in London, England." On this application the provisions of the Code of Civil Procedure apply. The contract was made in this state. Under section 1780, subdivision 1, this court has jurisdiction. The statutory test has been met. Should the courts of this state, in the exercise of discretion, refuse to allow plaintiff to bring this action here? I find no authority to the effect that the court should refuse to entertain it. In the absence of some convincing reason for so ruling the court should not decline jurisdiction and should not permit the parties to deprive it of jurisdiction. Furthermore, it is by no means certain that the parties stipulated in the contract that no action would be brought under it outside of England. If the clause quoted were so intended this court would not be bound to respect it. The question is whether there is now any such convincing reason and not what the parties had in contemplation when the contract was made. In *Smith* v. *Crocker,* 14 App. Div. 245, 249 the court said: "The contention that, because both the plaintiff and the defendant Crocker are non-residents, the trial court should have refused to entertain jurisdiction of the cause, we regard as equally untenable. We are referred to a number of cases (*Ferguson* v. *Neilson,* 33 N. Y. St. Repr. 814; *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315) in which it was held that the courts of this State will not retain jurisdiction of and determine an action for tort between parties residing in other States on causes of action arising out of the State, as a matter of public policy, unless special reasons are shown to exist which make it necessary or proper so to do. An examination of the cases cited, as well as of all to which our attention has been called where that rule has been applied, were actions in tort, and not actions upon a contract. Our courts have never refused to

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entertain jurisdiction of a cause of action arising upon contract." In *Belden* v. *Wilkinson,* 44 App. Div. 420, the court said: "The learned counsel for the respondents cites many cases in which it has been held, that unless for special reasons, non-resident foreigners should not be permitted the use of our courts to redress wrongs committed within their own territory or to enforce contracts made therein. But these cases were either cases where the action was brought by one non-resident against another non-resident to recover damages for a tort or where it was clearly apparent that the courts of this State could not do justice to the parties because of the special facts of the particular case. It is not the rule that the courts of this State will not take jurisdiction of an action of contract unless special reasons are found for their doing so, although that may be said to be the rule in regard to actions of tort. *Burdick* v. *Freeman,* 46 Hun, 138; affd., 120 N. Y. 420. But as to actions on contract the rule is precisely the other way. Our courts will ordinarily entertain such an action unless special reasons are shown why it should not be done." These excerpts appear to state the law. Many cases to the same effect more recent could be cited. Defendant seems to assert that in every decided case between non-residents access has been denied to our courts unless a plaintiff would otherwise go without a remedy; but I find no such rule in the reported cases. I am left with a distinct impression that defendant by striving to compel plaintiff to go to a distant jurisdiction is endeavoring to impose on him a disadvantage of position due to the inconvenience of going to England to meet defendant's claims. Accordingly, there would seem to be no justification for holding, as a matter of discretion, that the court should refuse to take jurisdiction of this action. The property attached is defendant's interest in certain

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options. Plaintiff secured options on oil properties in Ecuador, same being taken in the name of one Borja. The contract on which this action was based contemplates the transfer to defendant for stated considerations of those options, a large sum having been paid down at the time of the execution of the contract. Defendant, in order to fully acquire the rights of property, as to which Borja is the optionee, must make performance under the contract. The levy under the attachment was made by having the sheriff serve Borja with notice of the levy in the manner provided by the Code of Civil Procedure. Under these circumstances, I am satisfied that there was attachable property of defendant in the state of New York against which levy was made. Borja had legal title to the options. Under the contract defendant had certain rights in regard to those options. It might continue and fulfill performance on its part of the contract, and then Borja, had he remained in this jurisdiction, could have been compelled by our courts to exercise the options for defendant's benefit. It is also to be noted that the rights of the optionee under the options are expressly made transferable to any person within or without Ecuador. The statutory provisions provide for the levy of an attachment on a chose in action. Whether or not defendant would have performed is immaterial. It has the right to perform. The prevailing opinion in the case of *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, in the light of the dissenting opinion, indicates clearly that this right is subject to such levy. That Borja, after the levy, left the jurisdiction is of no consequence in determining whether a levy was made. In a case where the sheriff cannot take manual possession of property, or is not required to do so, the garnishee might leave the jurisdiction and take with him the property against which it was intended the attach-

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ment would ultimately become effective. The opinion in the case last cited, that in *Warner* v. *Fourth National Bank,* 115 N. Y. 251, and that in *Higgins* v. *McConnell,* 130 id. 482, illustrate this point. For example, one with whom securities are pledged, to secure the repayment of a loan, may be made the garnishee as a result of a levy under a warrant of attachment. In such a case the levy is effective, though there be a question as to whether the securities will be sufficient in amount to cover the loan. The right of the pledgor to have the pledgee account and pay over the surplus, if any, remaining after payment of the loan is a chose in action against which there may be a levy. Having acquired jurisdiction by such a levy under a warrant of attachment the court would not be deprived of jurisdiction by the departure of the pledgee with the securities. Presumably the attaching creditor would have a remedy against the garnishee in relation to the property, based upon the warrant of attachment and the levy thereunder, in any jurisdiction where either might be located. There is comment in defendant's brief to the effect that it would be unfair to hold that such a levy could be made and jurisdiction over defendant acquired wherever Borja might choose to go. There is no element of unfairness in this case, however. Borja, when the levy was made, had been in the United States for nearly two years, and he was sent here by defendant for the purpose of being available to give advice as to the options and the rights and the property affected thereby. Indeed, plaintiff argues that it would have been difficult to acquire jurisdiction of defendant in Ecuador, where the land to which the options relate is located, so long as Borja remained without that jurisdiction. It is entirely immaterial that plaintiff has an interest in these options until defendant per-

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forms, or that the interest of defendant may be of little value. It may be that the options are of great value and that they can be acquired under the terms of the contract on the payment of sums far less than they are worth. It would therefore be absurd to hold that defendant's interest was so contingent that it cannot be subjected to levy under the attachment. By the provisions of our statutes a chose in action is amply substantial to be the subject of such a levy, and with its value we are not concerned. Proper service was made on defendant without the state in compliance with an order of this court. It follows that the only contention on which defendant may be sustained is that jurisdiction was not acquired by the personal service of process on defendant's officer while he was in the state of New York. In all other respects the motion must be decided against defendant.

Ordered accordingly.

THE WATERFORD ELECTRIC LIGHT, HEAT AND POWER COMPANY, Claimant, v. THE STATE OF NEW YORK.

(Court of Claims, December, 1921.)

Waters and water courses — lands bounded on rivers and streams above tidewater — rules of the English common law do not apply to lands bordering on the Hudson river and the Mohawk river — the title to the bed of the Hudson river and the bed of the Mohawk river is in the state of New York — franchises — compensation for appropriation of lands in accordance with the provisions of the Barge Canal Act — title to the bed of the Hudson river in the state of New York not divested by chapter 164 of the Laws of 1901.

The state of New York, pursuant to chapter 147 of the Laws of 1903, appropriated for the Champlain canal lands and flowage rights of claimant extending on both sides of the Hudson river above tidewater for a distance of about two and

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one-half miles. The lands form part of original grants under English Colonial Patents. By chapter 164 of the Laws of 1901 claimant was "authorized to construct a dam across the Hudson river on the lands now owned by it or which it shall hereafter purchase or acquire * * * to forever maintain said dam and to flood back up said river so far as it owns or shall hereafter purchase or acquire the adjacent uplands * * * for the purpose of maintaining the pond formed by such dam; and any interests of the state in lands under the waters of said river covered by said dam or which may be flooded by the erection thereof or under any works which said company shall construct on or adjacent to said dam is hereby granted to said company, its successors and assigns." Claimant did not construct its dam and never obtained the consent of Congress to do so in accordance with the River and Harbor Act of March 3, 1899, but, relying upon said act of the legislature, it acquired a considerable part of its frontage on said river and made expenditures for the development of its property in reliance upon the provisions of said act. *Held,* that the rule of the English common law that grants which are bounded on rivers and streams above tidewater are presumed to extend to the middle of the stream has never been applied to colonial grants or state grants of lands bordering on the Hudson river and the Mohawk river, these rivers being an exception to the general rule because of their size, location and commercial importance, and the public use made of them from the earliest days as means of transportation and communication; that at the time of the enactment of chapter 164 of the Laws of 1901 the title to the bed of the river was in the state of New York and that the state's ownership was not divested and vested in claimant by the mere passage of said act. It was contemplated by said act that a dam should be erected and certain works constructed, in which event the title of the state to the lands under the waters of the river covered by said dam or flooded by its erection should pass to claimant. Said act, however, did grant to claimant a franchise which, having been accepted and acted upon, cannot be repealed, revoked or destroyed by the state appropriating it without compensation. The state having appropriated claimant's land in accordance with the provisions of the Barge Canal Act, claimant is entitled to compensation for its property taken for the public use, and for a judgment against the state in the amount of $250,000, with interest from June 30, 1913.

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CLAIM to recover compensation for lands and flowage rights appropriated by the state.

Thomas O'Connor (George E. O'Connor, William S. Ostrander, John L. Wells and Charles A. Collin, of counsel), for claimant.

Charles D. Newton, attorney-general (Edward J. Mone, George L. Meade and John D. Monroe, deputy attorneys-general, of counsel), for the State of New York.

SMITH, J. This claim has been filed to recover from the state of New York compensation for lands and flowage rights permanently appropriated and destroyed by the state, pursuant to chapter 147, Laws of 1903, for the Champlain canal.

The lands and flowage rights appropriated and destroyed extend along both sides of the Hudson river above tidewater for a distance of approximately two and one-half miles, forming connected and uninterrupted stretches along both sides of the river, and between their northerly and southerly limits there is a substantial slope in the river bed.

The appropriated lands were originally parts of the lands granted by English Colonial Patents, viz., on the easterly or Rensselaer county side of the river, the patent from William and Mary to Tunison and Bradt, dated August 27, 1691, the patent from George II to David Abrahamson Schuyler and others, dated May 19, 1737, and the patent from George III to Isaac Sawyer and others, dated July 23, 1763, and, on the westerly or Saratoga county side of the river the Halfmoon Patent granted by the Duke of York to Philip Pieterson Schuyler and Goosen Garritson, dated October 13, 1665, a confirmatory patent between the same parties dated May 4, 1668, and a second con-

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firmatory patent from Governor Dongan to Anthony Van Schaick, dated May 30, 1687.

Claimant claims that these patents, construed, as it claims they must be, according to the principles of the English common law, conveyed to the several patentees title to the bed of the Hudson river in front of the uplands granted by the patents, on each side of the thread of the stream, and that claimant as the successor to the titles of the patentees is the owner of the bed as well as the banks of the river and adjacent uplands within the limits of the appropriation.

Chapter 164 of the Laws of 1901, which was passed by a two-thirds vote in each house of the legislature and took effect on March 22, 1901, provides as follows:

"Waterford Electric Light, Heat and Power Company, its successors and assigns, are hereby authorized to construct a dam across the Hudson river on the lands now owned by it or which it shall hereafter purchase or acquire in the towns of Halfmoon, Saratoga county, and Schaghticoke, Rensselaer county, in such a manner as not to injuriously affect the water privilege of the Hudson river power transmission company, and such company is hereby authorized to forever maintain said dam and to flood back up said river so far as it owns or shall hereafter purchase or acquire the adjacent uplands or may have or shall hereafter purchase or acquire the rights of flowage thereon for the purpose of maintaining the pond formed by such dam; and any interests of the state in lands under the waters of said river covered by said dam or which may be flooded by the erection thereof or under any works which said company shall construct on or adjacent to said dam is hereby granted to said company, its successors and assigns."

A part of claimant's lands and flowage rights had been acquired by claimant prior to the enactment of

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the act of 1901, but more than one-half of the frontage on the river, on both sides, had been in good faith acquired and other development expenditures made after the passage of the act and in reliance upon its provisions, although it did not construct its proposed dam.

It is claimed by claimant that the effect of the act of 1901 was to quitclaim to and vest in claimant all of the right, title and interest of the state, if it had any, to and in the lands under the waters of the river which might be covered by the waters impounded by its dam when erected, or at least to grant to claimant a franchise, which when accepted and acted upon was irrevocable without compensation, to construct and forever maintain a dam in the river.

Claimant, therefore, claims that its lands and flowage rights on both sides of the river together with the lands under water which it claims to have owned as the successor of the original patentees thereof, or by quitclaim from the state, or both, constituted a very valuable potential water power site, worth at least $350,000, and that, if it be held that it did not own the lands under water, its uplands together with the franchise which it claims was granted by the act of 1901, constituted a property of no less value.

By a series of appropriations duly made pursuant to the provisions of chapter 147, Laws of 1903, the state has appropriated from claimant all of its uplands, and, from the owners of the fee thereof, the uplands over which claimant had acquired flowage rights, and has constructed a stretch of the Champlain canal partly in the river adjacent to claimant's uplands and partly in and through uplands, flotation of sufficient depth at this location having been furnished by means of a dam in the river at substantially the place where claimant had contemplated locating

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its dam, this state dam causing claimant's uplands and the uplands over which claimant had acquired flowage rights to be overflowed by the waters of the river and canal, thus taking and destroying all of claimant's property and rights in the lands appropriated. As compensation for such lands and rights so taken and destroyed claimant demands judgment for $350,000, the value thereof, as claimed, as a water power property.

The state contends that the bed of the river was not granted by the patents under which claimant claims title or by the act of 1901, that no franchise or water rights, in fact, nothing more than a revocable permit or license, was granted by the act of 1901, that whatever the nature of claimant's rights in and to the bed of the river, or to the use of the waters of the river, they were subject and subservient to the state's right to improve the navigation of the river, a right which the state claims it was exercising in building the Champlain canal, that claimant, having failed to obtain the consent of Congress to erect its dam, or the approval by the federal war department of its plans therefor, in accordance with the River and Harbor Act of March 3, 1899, was without sufficient lawful power, authority and right to proceed with its water power development, and that even though claimant owned the bed of the river, or an irrevocable franchise from the state by virtue of the act of 1901, and was not precluded from proceeding with its development by the fact of its failure to obtain the consent to and approval of its project by the federal authorities, yet its property and rights were of inconsiderable value as a water power property, and worth not more than $50,000.

The rule that a grant of land bounded by a nontidal stream is presumed to convey to the thread of

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the stream is a rule of construction to be used in ascertaining the true intention of the parties. The question whether the conveyance carries title to the center of the stream depends upon the intent of the parties, to be gathered from the description of the premises read in connection with other parts of the deed or grant and by reference to the situation of the lands and the condition and relation of the parties to those and other lands in the vicinity. The presumption that the grantee takes to the center of the stream may be controlled by the terms of the conveyance as interpreted by the surrounding circumstances manifesting intention to the contrary. 9 C. J. 189; *Mott* v. *Mott*, 68 N. Y. 246; *Hall* v. *Whitehall Water Power Co., Ltd.*, 103 id. 129; *Graham* v. *Stern*, 168 id. 517. The intent of the parties may be shown by acts and conduct subsequent to the grant. *Watson* v. *City of New York*, 67 App. Div. 573.

None of the patents in question granted lands on both sides of the river, and, with respect to the description of their limits on the river side, none, in terms, specifically and unaided by the rule of the common law invoked by claimant, placed that boundary in the river bed. The language of each patent is, however, apt to fix the river boundary at the thread of the stream if the rule of the English common law, that grants which are bounded on river and streams above tide water are presumed to extend to the middle or thread of the stream, is applicable to it. That this is, and was at the time of these grants, a rule of the English common law is well understood, generally accepted, and needs the citation of no authorities. However, I think it is well settled that this rule was never applied to grants by colony or state of lands bordering the Hudson, which, like the Mohawk, has been considered an exception to the rule,

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for the reason that as to it and the Mohawk, because of their size, location and commercial importance and the public use made of them from the earliest times as means of transportation and communication, reason and necessity demanded that they be excluded from the application of the rule, a demand in which all interested parties acquiesced.

Counsel on both sides have been most diligent in obtaining and placing before the court a mass of evidence as to the navigability and navigation of the upper Hudson and as to the manner in which its bed has been regarded, as to ownership and control by colony, state and riparian owners from the earliest times. Time and space will not permit a detailed analysis here of such evidence. It is sufficient to state that such evidence establishes the fact that from the earliest times down to about the time when the state undertook the work of canalizing the river, both colony and state have asserted, with the acquiescence of riparian owners, exclusive ownership, dominion and control of and over the bed of the upper Hudson.

Indeed the state's ownership of the bed of the river is distinctly recognized in several deeds in claimant's chain of title to parcels 2147, 4416 and 4417, in which "the line of ownership by the State of New York of, in and to the Hudson River and its bed" is mentioned in describing the easterly boundary of the lands conveyed by those deeds. Upon a state of facts and of history in no appreciable way differing from the facts and history with respect to the upper Hudson, it has been held that the Mohawk river was in its natural state a navigable river and that title to lands under its waters did not pass by patent grants of its banks (*People ex rel. Loomis* v. *Canal Appraisers*, 33 N. Y. 461; *Danes* v. *State of New York*, 219 id. 67), and that the Mohawk and Hudson were exceptions to

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the application of the common law rule with regard to the construction of public grants of lands bordering nontidal waters. In recent Hudson river cases (*West Virginia Pulp & Paper Co.* v. *Peck*, 189 App. Div. 286, and *Thompson* v. *Fort Miller Pulp & Paper Co.*, 195 id. 271), the Appellate Division, third department, has held the Mohawk rule applicable to Hudson river grants.

It follows, that at the time of the enactment of chapter 164, Laws of 1901, the title to the river bed at the location in question was in the state of New York. Nor was that ownership divested from the state and vested in claimant by the mere passage of the act of 1901. It was not intended to have that effect as its plain terms indicate. It was contemplated that a dam should be erected and certain works constructed, whereupon, the title of the state to the lands under the waters of the river covered by the dam or flooded by its erection, or under any works constructed by claimant, should then pass into claimant's ownership. The erection of a dam and the construction of works was indispensable to the determination of what and how much lands were to pass by the grant.

The act was, however, by its plain terms intended to grant a franchise to claimant to erect and maintain a dam and other works and thereby to acquire title to the lands under water covered by the dam or flooded by means of it, and, having been passed by a two-thirds vote, is sufficient for that purpose. *First Construction Co.* v. *State of New York*, 221 N. Y. 295, 316, 317. Such a franchise, having been accepted and acted upon, cannot be repealed, revoked, or destroyed by appropriation, without compensation. *First Construction Co.* v. *State of New York, supra; People* v. *Hudson River Connecting R. R. Corp.*, 228 N. Y. 203. The franchise was to build and forever maintain a dam by

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means of which the waters of the river might be flooded back up the river "so far as it (claimant) owns or shall hereafter purchase or acquire the adjacent uplands or may have or shall hereafter purchase or acquire the right of flowage thereon for the purpose of maintaining the pond formed by such dam."

The franchise was of necessity as well as by its terms to be used in connection with the lands and flowage rights which claimant owned or might acquire, and was so related to said lands and flowage rights as to be attributes thereof entitled to be considered as an element of value in fixing the amount of compensation to which claimant is entitled because of the appropriation and destruction of its lands and flowage rights.

It is contended that the act of 1901 is unconstitutional, in that, as it is urged, it is a private and local act and embraces more than one subject, whereas only one subject is expressed in its title, therefore, offending against section 16 of article III of the State Constitution.

The point is not well taken. While of course the act is a private act it embraces but one subject. The grant of lands covered by the waters to be flooded back by the dam was incidental to the subject of the construction of the dam. *Matter of Long Sault Development Co.* v. *Kennedy*, 158 App. Div. 398. No provision of the act was so foreign to its main purpose and subject as to mislead and deceive or tend to mislead and deceive the members of the legislature or the public. *Economic Power & Construction Co.* v. *City of Buffalo*, 195 N. Y. 298; *People ex rel. Olin* v. *Hennessy*, 206 id. 33.

Even though it be held that the act embraces two independent subjects, one of which is not expressed in

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the title, and that it is unconstitutional as to the subject not expressed in the title, the subjects are separable, and the act is constitutional as to the subject which has been expressed in the title. *First Construction Co.* v. *State of New York,* 221 N. Y. 295, 320.

It is further urged by the state that whatever claimant's rights in or to the river bed or the use of the waters of the river might have been, the same were held subject and subservient to the state's right to improve the navigation of the river without compensating claimant for consequential damages resulting from the work of the improvement. This proposition, if conceded, will not defeat claimant's right to compensation for the value of its property taken by the state in the exercise of its right of eminent domain pursuant to the provisions of a statute which expressly provides that compensation shall be made for property so taken. Laws of 1903, chap. 147, § 4; *Lehigh Valley R. R. Co.* v. *Canal Board,* 204 N. Y. 471; *Oswego & Syracuse R. R. Co.* v. *State of New York,* 226 id. 351.

I find no difficulty in agreeing with the contention of the state that the work in which the state was engaged, in connection with which the several appropriations were made, was in a broad sense an improvement of the navigation of the river, none the less so because at points it was deemed advisable to cut into a portion of the river bank and construct a lock and a part of the canal channel partly or wholly shoreward of the highwater line. But in the carrying on of its project for the improvement of the navigation of the river, it was necessary, in addition, to erect a dam, the necessary effect of which was to permanently flood lands in the ownership of claimant, and to divert the waters of the river outside of the natural bed of the river, which it could not do without compensation

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at common law, or under either the Federal or State Constitutions. U. S. Const. Amendment V; State Const. art. I, § 6. Furthermore section 84 of the Canal Law explicitly provides for the allowance and payment of the just and equitable damages sustained by owners of lands overflowed because of the erection of dams in connection with canal works, and chapter 147, Laws of 1903, provides for the appropriation of all lands, structures and waters necessary to be used for the improved canals and for making compensation therefor. Nor has the state attempted to take or destroy claimant's property or rights without compensation. Proceeding strictly in accordance with the provisions of the Barge Canal Act, the state officials have appropriated claimant's lands and lands in which it owned flowage rights, and pursuant to the provisions of that act claimant has come to this court to obtain, not consequential damages resulting from a work of navigation improvement which has not invaded its legal rights, but compensation for its property which has been taken from it for the public use, under a statute which declares that such compensation shall be rendered.

It is also urged by the state that claimant's franchise was not complete for the reason that it had not obtained consent of congress for the erection of its dam, or the approval by federal authority of its plans pursuant to the provisions of certain federal statutes. River & Harbor Act of March 3, 1899, chap. 425; General Dam Act of June 21, 1906, as amd. by act of June 23, 1910, chap. 360.

The acts referred to relate to "navigable waters of the United States" and the construction therein of obstructions to navigation, dams included, and forbid the commencement of such construction without first obtaining the prescribed consent and approval of

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plans, and empower the imposition of certain conditions and restrictions in connection with the approval of plans.

It is claimed by claimant that the stretch of the river along which its lands and flowage rights lay was not "navigable waters of the United States" within the meaning of the federal statutes cited, for the reason that in that stretch of the river no navigation had been actually carried on for many years prior to the passage of the federal statutes, and that navigation over this stretch as a link in a continuous highway over which commerce might be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water had been rendered impossible by reason of the erection of several dams above and one below the location of claimant's lands. *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 id. 411.

Claimant further urges that the federal statutes were not intended to apply to this stretch of the river for the reason that the presence of reefs and rapids and the shallowness of the water in that stretch rendered it unsuitable and unfit for the uses of navigation as navigation was usually carried on at the time of the passage of the federal statutes, and that the construction of a dam in that stretch would constitute no obstruction to navigation and hence that this stretch was in no practical sense navigable waters of the United States.

This contention of claimant I think must fail. In legal character the Hudson river, as well above as below claimant's property, is a navigable river (*Palmer* v. *Mulligan*, 3 Caines, 307; *Harris* v. *Thompson*, 9 Barb. 350; *West Virginia Pulp & Paper Co.* v. *Peck*, 189 App. Div. 286), and there is no change in the legal character of a stretch in which there may be

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reefs, rapids and shallow water. It is the nature of a stream in its entirety which determines its character as to navigability, and its character as so determined is not affected by the fact that there are stretches where navigation is difficult or indeed impossible. *Morgan* v. *King*, 35 N. Y. 454; *Matter of Comrs. of State Reservation*, 37 Hun, 537; *St. Anthony Falls Water Power Co.* v. *Water Comrs.*, 168 U. S. 349, 42 L. Ed. 497. The fact that artificial obstructions, capable of being abated by due exercise of the public authority, exist in a stream does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. Such a stream is within the application of the federal statutes under consideration. *Economy Light & Power Co.* v. *United States*, 256 U. S. 113.

However, the acts of congress do not limit the nature or extent of claimant's property rights, but prescribe conditions under which only they may be exercised. Such conditions must of course be complied with before a dam may lawfully be constructed, and the fact that the conditions had not been complied with prior to the appropriations is a fact to be taken into consideration in fixing the value of claimant's lands and flowage rights appropriated and destroyed. It is true that, because of dams in the river constructed by virtue of legislative authority, navigation in any practical way could not be carried on in the stretch of the river upon which claimant's lands fronted, and that for many years because of the dams and because of the construction and use of the Champlain canal no navigation there had been carried on, in addition to which the legislature had expressly authorized the construction of a dam at this location, yet the provisions of these federal statutes appreciably affected the market value of claimant's lands and rights. While in

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the conditions and circumstances here existing, it may not fairly be assumed that congress would arbitrarily or capriciously withhold its consent to the construction of a dam, or that the secretary of war or chief of engineers would impose unreasonable or destructive conditions or stipulations, yet the fact that the power granted by the statutes exists and might be exercised in such manner as to molest, disturb or restrict the free enjoyment of the property would, with reason, be considered by a prospective purchaser as an element of influence calculated to reduce its market value.

We have considered these facts and conditions in fixing the value of claimant's lands and rights appropriated by the state and have reached the conclusion that the fair and reasonable value of such lands and rights at the time of the appropriation was $250,000.

The lands and flowage rights owned by claimant and appropriated by the state, together with the franchise granted to claimant by chapter 164, Laws of 1901, constituted one entire property whose most beneficial and valuable use was its employment as a whole for the development of water power. This entire property has been appropriated by the state by a series of appropriations, twenty-two in number, the first on March 17, 1910, and the last on June 30, 1913. It is not practicable to assign to each of the appropriated parcels a numerical proportion of the value of the entire property, for its value depended upon its use as an entirety. And while twenty-two several appropriations have been made by the state, their practical effect, so far as they affect value, is as of one single appropriation consummated on June 30, 1913, the date of the last appropriation. It does not appear that possession of any parcel was actually taken by the state prior to June 30, 1913, and only three appropriations were made prior to June 25, 1913. In the circum-

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stances of this case, it seems just and reasonable to consider claimant's property as one parcel appropriated by one appropriation consummated on June 30, 1913, and that an award in the amount of $250,000, with interest from June 30, 1913, will fully compensate claimant for the property so appropriated.

Claimant is entitled to judgment herein in the amount of $250,000, with interest thereon from June 30, 1913.

ACKERSON, P. J., concurs.

Award accordingly.

THE PEOPLE OF THE STATE OF NEW YORK on the Complaint of CORNELIUS J. CURTIN *v.* CHARLES LORING, Defendant, Appellant.

(County Court, Bronx County, December, 1921.)

Traffic regulations — city of New York.

Article 5 of the traffic regulations of the city of New York provides: "* * * Section 2. A vehicle's driver when about to turn either from a standstill or while in motion, shall give timely signal by hand or whip or in some other unmistakable manner to indicate the direction of the turn. * * * Section 4. Police Whistle signals shall indicate: One blast — N. and S. traffic stops and E. and W. proceeds. Two blasts — E. and W. traffic stops and N. and S. proceeds. Three or more blasts — The approach of fire apparatus or other danger. * * *"

Defendant was proceeding north with his vehicle and upon one blast of the traffic officer's whistle did not stop but turned into a cross street and proceeded east, contending that the signal was to stop north and south traffic and not to prohibit a driver going north from joining in the east and west traffic. *Held,* that upon one blast of the traffic officer's whistle north and south traffic must stop at foot crossings of the street and not proceed until the officer has signaled that such traffic may continue. One desiring to turn into cross street should convey his intention to do so to officer before proceeding.

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APPEAL from conviction for violation of city ordinance.

Johnson & Galston, for appellant.

Edward J. Glennon, district attorney (Frank Oliver, assistant district attorney, of counsel), for People.

GIBBS, J. The defendant appeals from the judgment of conviction rendered by the City Magistrates' Court, borough of The Bronx, eighth district, finding him guilty of violating section 42, article 3, chapter 24 of the Code of Ordinances of the city of New York, in that he failed to stop the vehicle which he was driving, on signal.

The record discloses that defendant was proceeding north on the Grand Concourse in an automobile. As he approached Fordham road, the police officer in charge of the traffic at the intersection of Grand Concourse and Fordham road signaled with his whistle and with his hand for north and south traffic to stop and for east and west traffic to proceed. Defendant, however, did not stop, but turned into Fordham road and drove his automobile east. He was overtaken by the police officer, charged with failing to observe the signals of the officer and thereafter convicted by the magistrate.

Appellant bases his appeal to this court on the construction of the traffic rules and regulations made by the police commissioner of the city of New York. The police commissioner, by section 315 of the Greater New York charter, is authorized to make such rules and regulations for vehicular traffic as may be necessary. Section 42 of article 3, chapter 24 of the Code of Ordinances of New York city, gives exclusive control of the management of this traffic to the commissioner. In accordance with this power, the police commis-

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sioner has prescribed regulations for street traffic in New York city.

Article V of these regulations provides the manner in which signals shall be conveyed to vehicle drivers by a traffic officer. This article is as follows: "* * * Section 2. A vehicle's driver when about to turn either from a standstill or while in motion, shall give timely signal by hand or whip or in some other unmistakable manner to indicate the direction of the turn. * * * Section 4. Police Whistle signals shall indicate: One blast — N. and S. traffic stops and E. and W. proceeds. Two blasts — E. and W. traffic stops and N. and S. proceeds. Three or more blasts — The approach of fire apparatus or other danger. * * *."

In the case at bar, the officer in charge of traffic gave one blast on his whistle. Defendant did not stop, but turned into the crossing street and proceeded east. He now contends that although the signal given by the officer is to stop north and south traffic, it does not prohibit a driver going north or south from joining in the east and west traffic.

In the present day, since motor driven vehicles are so numerous in New York city, it becomes necessary for the protection of pedestrians that there be a strict compliance with the traffic rules and regulations prescribed by the police commissioner. To hold otherwise would be detrimental to public safety. The construction I place upon article V of these rules is, that upon the officer giving one blast on his whistle, north and south traffic must stop at the foot crossings of the street and not proceed until the officer has signaled that such traffic may continue. At that time a driver desiring to turn into the crossing street either east or west should convey his intention to do so to the traffic officer. It is obvious that if one proceeding north were

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permitted to turn into the cross street and continue east or west, as the case may be, after receiving the signal to stop, and for east and west traffic to proceed, injury might easily be sustained by a pedestrian going east or west. Article V of the traffic regulations was created to avoid such an occurrence. Accordingly, I find that the defendant was guilty of the violation charged.

Judgment of conviction affirmed.

In the Matter of the Final Judicial Settlement of the Accounting of Proceedings of the Estate of GEORGE E. NEIL, Deceased.

(Surrogate's Court, Westchester County, December, 1921.)

Wills — construction of — when legacies abate — general legacies usually abate ratably when assets insufficient for full payment, in absence of intention to prefer — trust for education of infant children preferred when other provision insufficient.

Where general legacies are of pure bounty and there is no expression or inference to be drawn therefrom manifesting an intention to make a preferred gift, the general rule is that in the event of a deficiency of assets to pay them in full, the legacies abate ratably though in some circumstances the courts have found an intention to prefer without express words on the part of the testator.

A testator who left no real estate and whose personal estate was largely insufficient to pay general legacies in full bequeathed $50,000 to his executor in trust, to keep the same invested and pay the income thereof for the use and education of his three infant children, with direction that if said income was not so used, then to accumulate and add it to the principal which testator directed to be equally divided among his children when they attained the age of twenty-five years. *Held*, that while it is the law that if a legatee is otherwise provided for the legacy will abate, yet where the "other provision" is

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neither sufficient nor reasonable, the gift for the use of the children under the will should be preferred.

Where, as here, a deed of settlement providing for the support and maintenance of decedent's wife and children did not provide for the education of the children, they are not "otherwise provided for" either in the will or the deed of settlement, for the purpose of education, and the trust for that purpose should be preferred as against the contention of the widow that all general legacies should abate, *pro rata*.

CONSTRUCTION of will.

Charles A. Brodek, for executor.

Remsen & Parsons (Daniel S. Remsen, of counsel), for Myra J. Neil.

Joseph E. Merriam (Harrison T. Slosson, of counsel), special guardian.

SLATER, S. Upon this final accounting, the will of the decedent, which was admitted to probate February 4, 1918, must be construed. We are to deal with the testator's intention with regard to the gift to his children. The personal estate will amount to less than $50,000 and is largely insufficient to pay the general legacies. There is no real estate. Shall the rigid rule of the law be supplanted with principles and doctrines that govern human conditions? Shall the general legacies abate, or is the gift to the children to be preferred? The general legacies are as follows: $10,000 to one Margaret Spitz, a friend of the decedent; $10,000 to a brother of the decedent; $50,000 in trust for the life of the mother of the decedent, Myra J. Neil; $50,000 in trust for the three infant children of the decedent, in these words: "*Fourth.* I give, devise and bequeath unto my executors the sum of Fifty thousand ($50,000) dollars in trust never-the-

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less to invest the sum and keep the same invested and to receive the incomes thereof and pay the same for the use and education of my three children, George E. Neil, Jr., Helen Neil and Florence Neil, and if the income of the above trust fund is not used for the education of my said children, then the same is to accumulate and added to the principal. *Fifth.* The principal of the above said trust fund is to be divided equally amongst the three children when they have attained the age of Twenty-five (25) years."

The children are of tender age. In 1918, they were aged eight years, thirteen years and fifteen years, respectively. They contend by their special guardian that the trust legacy for their "use and education" is preferred. Myra J. Neil, the mother, contends for a *pro rata* leveling of all general legacies.

The rule with regard to bequests made in form of a general legacy and of pure bounty, where there is no expression, or inference to be drawn therefrom, manifesting an intention to make a preferred gift, is that, in the event of a deficiency to pay in full, they shall abate ratably. However, under some circumstances, the courts have found an intention to prefer, without express words on the part of the testator. The leading and foundation case establishing this construction is *Lewin* v. *Lewin,* 2 Ves. Sen. 415 (1752). Lord Chancellor Hardwick says: "The gift was for maintenance." A preference was held for the wife and children unprovided for. "It is not suggested that the wife and children have any other provision," and that when "there is no provision by settlement, or otherwise, under which his wife, or children could claim, it is natural for him in making the disposition to place them in the first place." In our state the rule established in *Lewin* v. *Lewin, supra,* has been followed. It has been held that legacies for the support and main-

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tenance of a wife and children, otherwise unprovided for, do not abate with general legacies. There are only eight reported cases in our courts dealing with the subject. *Stewart* v. *Chambers*, 2 Sandf. Ch. 382, 393 (1845), adopts and follows the principle set forth in *Lewin* v. *Lewin, supra.* In *Petrie* v. *Petrie*, 7 Lans. 90, 97 (1872), the court said: "A legacy for *education*, like one for maintenance, must be paid in preference to the general legacies given by the will, if the assets are insufficient for the purpose." *Scofield* v. *Adams*, 12 Hun, 366 (1877), recognizes the doctrine laid down in the preceding cases and states that "the rule of law enunciated in them is reasonable, as it is natural and in accordance with common sentiments of affection, * * *. It commends itself to the conscience as just and right. It would be unnatural not to intend especial favor in the bestowal of bounties to those who were strong in the affections and dependent upon kind regard." *Bliven* v. *Seymour*, 88 N. Y. 469 (1882), Judge Finch writing for the court, says: "A general legacy may sometimes have a preference * * * where it is given for the support and maintenance of an own relative, otherwise unprovided for (*Scofield* v. *Adams*, 12 Hun, 370), or for the education of such relative (*Petrie* v. *Petrie*, 7 Lansing, 90), or where it is in lieu of dower and so may be deemed a purchase-price." This principle was followed by Chief Judge Ruger in *Matter of Chauncey*, 119 N. Y. 77 (1890). Surrogate Abbott of Kings county in *Matter of Carr*, 24 Misc. Rep. 143 (1898), adopted this principle, especially referring to the fact that it should be so, unless the legatee was *otherwise unprovided for*. The more recent case is *Matter of Wenner*, 125 App. Div. 358 (1908); affd., 193 N. Y. 672. In *Matter of Lloyd*, 166 App. Div. 1 (1915), the opinion of the learned referee, Henry W. Jessup, sustaining this principle, was

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adopted by the Appellate Division as its opinion. The referee speaks of "the legatee being not otherwise provided for *in the will.*"

What is meant by "otherwise provided for?" In several of the cases, the will did otherwise provide for the legatee. None of the cases, however, considered what was meant by "otherwise provided for." Neither did they discuss or decide the sufficiency of any provision otherwise made. Upon a reading of the foundation case, *Lewin* v. *Lewin, supra,* I am of the opinion that "otherwise provided for" means otherwise provided for in the will, or by the terms of some settlement made by the decedent.

And, I am convinced that "otherwise provided for" means a provision for support and maintenance, adequate and reasonable. A legatee may be otherwise provided for in a stinted measure, and if it is insufficient and unreasonable for proper support and maintenance, he is not truly provided for. I feel that the principle of the canon of construction should be, if the decedent does not *sufficiently* provide for his children in another instrument, or otherwise in the will, an intention will be presumed, that he designed to give them the amount of the legacy specified in the will, even though the estate is insufficient to pay the general legacies.

There was offered in evidence an agreement of settlement dated June 17, 1916, made between the decedent and his wife, wherein a trust company in New Jersey was named as trustee. It recites that disputes have arisen between the decedent and his wife; his desire to provide for the *support and maintenance* of the wife and children; sets up a fund of $25,000 with certain real property to provide for an annual sum of $2,500 for such support and maintenance for the natural life of the wife; the right to occupy a certain

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home in East Orange, N. J., for her life; the use of a certain automobile, all of which she agrees to accept in full satisfaction for support and maintenance for herself and the three children. Upon the death of the wife, the corpus of said trust shall pass in fee to the three children, or the survivor of them. It sets aside certain real property in the city of Newark to be held in trust for the life of the wife as an asset to assist in producing the annual income of $2,500. The wife agrees not to abandon the premises in which she resides and in which she has a life estate, and it is further agreed in the deed of trust that " an abandonment shall consist of a voluntary departure of said Corinne Neil and her children from the premises in question for a period of more than four months, without the consent of said George E. Neil, and, should such abandonment occur, the reversionary interest of the said George E. Neil shall immediately come into effect and defeat and forever extinguish all interest in said premises otherwise possessed by said Corinne Neil." In such event the provision of the settlement for the children would be wiped out, as the reversion would go to the decedent's estate to be applied toward the payment of the general legacies.

Objection was made to the reception of this instrument in evidence and decision thereon was withheld. I now decide that said instrument may be admitted in evidence and the record has been amended to so indicate.

Claims for preferential payment of general legacies are founded upon a consideration, as when a legacy is given to a wife in lieu of dower, or when a legacy is made for the support, maintenance, or education of children, because the law fastens upon a father the legal obligation to support, maintain and educate his children, despite the fact that a provision for their

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support may be made in a separation agreement with the wife. The principle of preferential payment of a gift to children is sustained in *Matter of Obst*, 115 Misc. Rep. 711; *Matter of Mould*, 117 id. 1. Because of such an agreement, he is not relieved of that fundamental obligation. *Michaels* v. *Flach*, 114 Misc. Rep. 225, 232. The obligation rests upon the father to support his own infant children even though they have an estate of their own. *Goodman* v. *Alexander*, 165 N. Y. 289.

It will be recalled that in the separation agreement, the trust is for the "*support and maintenance*" of the *wife and the children*, while the trust in the will is for the "*use and education*" of the children. While "use" is broad enough to cover support and maintenance, we must give effect to the gift in trust for the *education* of the children. In *Petrie* v. *Petrie, supra*, it was held that a legacy for *education*, like one for maintenance, must be preferred to general legacies, and I assume, if other provision is not made for such purpose. As to the trust for the *education* of the children, it cannot be argued that the prior settlement made any provision in this regard. Webster says, support and maintenance are synonymous, and to support and maintain a person is to give means of livelihood to him. It implies existence and the continuance of bodily life, and provides for bodily care. One may be supported and maintained, but not educated. Education is instruction and is not necessary for physical existence, and to require one to support and maintain a person does not require one to educate him. It is significant that the will was made July 6, 1916, nineteen days after the making of the settlement agreement. The will recites the agreement in part. By its very terms, it shows every evidence of the testator's great desire and intent to provide for his children. It

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would appear that he did not leave at death as much property as he apparently believed he had in 1916. The evidence adduced shows his earning capacity at that time to be large. It may be inferred that the decedent, realizing he had not provided for the education of the children, intended by his last will and testament to do so. The law of the state demands the education of its citizens, and society today is demanding the higher education of all the young of the state. A surrogate is empowered out of either income or principal of an infant's property to authorize payments for the support or education of infants (Surrogate's Court Act, § 194, former Code Civ. Pro. § 2664), and so the Supreme Court may take from the corpus of a fund held in trust for infants, moneys to provide for their education. The court will take judicial notice of the cost of higher education. Education is the keystone of our civilization. This legacy provides the only moneys in so far as the father is concerned, for his children to obtain a college education. To hold that it must abate *pro rata* with the legacies which are ones of mere bounty, would be against public policy. The gift in the instant case is for education, and the principle of " otherwise provided for " cannot be applied, because the trust settlement upon the wife and the children is clearly for their support and maintenance, and not for education. Education is not within the ruling terms of the trust settlement. In one place the wife is made to promise and agree that she will support and educate them, but, the husband cannot rid himself of the obligation which the state casts upon him to support and maintain and educate his own children. No provision being otherwise made for the education of the children, we are without this rule of the law as laid down in the cases cited.

The testimony adduced on the hearing also indicates

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the station in life enjoyed by the wife and children before divers differences arose to divide the family. It also shows that the decedent voluntarily assisted in maintaining the family from the date of the separation agreement until his death. That up to the very week of his death, he made weekly visits to the children, wrote letters, all indicating his love and affection for them. The evidence indicates the expenses *per annum* for the keep of the family before the separation agreement — thereafter, and since the death, clearly showing that the present income of $2,500 under the terms of the trust agreement is not adequate, to provide for their living (not to consider the education of the children) in the same manner as they lived before the family was torn asunder, or before the death of the father. An officer of the trust company testified that the payments of $2,500 a year under the trust agreement had been made at the expense of allowing the real property to depreciate to a very large extent. That the property today " was very badly in need of repair; that the Ninth Street property needs a new roof, wants painting, and there are several thousand dollars worth of repair work actually needed there, and that, if the property is properly cared for as a prudent man would care for his property, the income for several years would be consumed." From this testimony and from the report of the trustee placed in evidence by stipulation, it is learned that the cost of needed repair of the houses forming part of the trust property will materially reduce, and may entirely consume for some years the annual income of $2,500. Surely in such years " support and maintenance " for the wife and children as " otherwise provided for " will be precarious. It also indicates that one of the legatees was a stranger to the blood, and a person with

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whom the decedent was living in illicit relationship at the time of his death.

As the trust deed does not provide for the education of these children of tender years, we must say that, so far as *education* is concerned, they are not otherwise provided for.

I hold that this legacy has a preference for two reasons: *First,* That while the law is, that if a legatee is otherwise provided for the legacy will abate, but that in the instant case the " other provision " is not sufficient, nor reasonable, and consequently, they are not provided for. Therefore, the gift in the will for their *use* should be preferred. *Second,* The deed of settlement does not provide for their *education,* and because of that, it can be held that they are not " otherwise provided for," either in the will, or by the terms of any settlement, for the purpose of education and the trust for that purpose should be preferred.

Dean Pound in his work on " Mechanical Jurisprudence," says: " We need a movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to first principles; for putting the human factor in the central place." Nowhere is this more true than when we are dealing with the relation existing between parent and child. No place more necessary where human conditions should govern, and putting the human factor in the central place, than in the instant case.

" It is in weighing and balancing these interests that the discretionary element must enter. It is clear that rules must be abandoned and resort must be had to the fundamental interests that lie behind them. Judges must have regard for the human conditions they are to govern. This statement represents a distinctly new spirit in judicial method, the spirit which will refuse to uphold abstract categories and formal deductions

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to the detriment of individual and social interests." 35 Harvard Law Review, 68, 70, Nov. 1921. Courts are "*too often apart from life,* instead of a *part of life.*"

It is simply an evidence of the spirit of the times in the consideration and determination of individual and social interests. It is the conviction of the court that these days, in judicial decisions, human elements must enter and human conditions are to govern to a degree, that "rights and duties in systems of living law" to some extent must prevail as against century aged set rules.

Let decree be entered upon the accounting holding a preference for the general legacy of $50,000 in favor of the children of the decedent.

Decreed accordingly.

Matter of the Estate of LUDWIG SOBEL, Deceased.

(Surrogate's Court, New York County, December, 1921.)

Wills — construction of — legacies — "relatives" limited to those who would take under Statute of Distributions — provisions for widow inconsistent with her taking dower — election.

A testator survived by his widow and two brothers and three sisters devised and bequeathed sixty per cent of all his estate, real and personal, to his wife and the balance equally to his "relatives" and in addition the wife was given all bonds and jewelry. *Held,* that "relatives" should be construed to embrace those only who would take under the Statute of Distributions in case of intestacy.

The provisions of the will for the widow are inconsistent with her taking dower and she is put to her election.

APPLICATION for construction of a will.

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Joseph Day Lee, for executors.

Isidor E. Schlesinger, for legatee, Margaret Sobel.

COHALAN, S. This is an executors' accounting, in which this court is petitioned for a judicial construction of the last will and testament of the above-named deceased by reason of the following paragraph thereof:

"I hereby devise and bequeath 60 per cent. of all my real estate and personal property to wife, Margaret Sobel, and the balance equally to my relatives. All bonds and jewelry to my wife absolutely."

The court is asked to determine what persons are included in the term "relatives;" whether the legacy of the bonds and jewelry to the wife is in addition to the sixty per cent of the estate; and whether the provisions for the wife are in lieu of dower.

The testator left as his only next of kin and heirs at law two brothers and three sisters. He left a widow, but no descendants. The word "relatives" as used in this will should be construed to embrace those persons who would take under the Statute of Distributions in case of intestacy. *Gallagher* v. *Crooks*, 132 N. Y. 338; *Ennis* v. *Pentz*, 3 Bradf. 382. The terms "relatives" and "relations" in their primary sense are broad enough to include any one connected by blood or affinity, even to the remotest degree, but where they are used in wills as defining and determining legal succession such words are construed to include only those persons who are entitled to share in the estate as next of kin under a statute of distributions. Bouvier L. Dict. (3d ed.); Schouler Wills (5th ed.) § 537. The words are synonymous with next of kin, and a widow is not a next of kin. *Murdock* v. *Ward*, 67 N. Y. 387; *Luce* v. *Dunham*, 69 id. 36, 40;

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Lawton v. *Corlies,* 127 id. 100, 108; *Matter of Devoe,* 171 id. 281. Furthermore, the testator plainly shows that the widow is not to be included in the term "relatives" by limiting her share to the specific sixty per cent. If it were determined that she were included in that term, she would share equally with the testator's brothers and sisters in the balance, which was not the intention of the testator. The bonds and jewelry are given absolutely to the widow. This legacy is in addition to the sixty per cent of the real and personal property.

The widow is not entitled to dower in the testator's real estate in addition to the provisions made for her by his will. Dower is favored by the law, and unless it is excluded by express terms or necessary implication the widow is not put to an election. In this will it is not excluded by express terms but if the widow is allotted dower in addition to the bequest and devise to her, it will destroy the scheme of the will, which is to divide the testator's estate between his widow and his relatives in the ratio of sixty to forty. Such ratio cannot be preserved if, in addition to the sixty per cent, the widow is to have dower. The provisions of this will are inconsistent with the widow taking dower, and she is therefore put to her election. *Wilson* v. *Wilson,* 120 App. Div. 581, and cases cited therein; *Matter of Gorden,* 172 N. Y. 25.

Submit decree on notice, construing the will accordingly and settling the account.

Decreed accordingly.

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In the Matter of the Taxation under the Acts in Relation to Taxable Transfers of the Property of CHARLES KIERSTEAD MEYER, Deceased.

(Surrogate's Court, Queens County, December, 1921.)

Transfer tax — non-resident — law of domicile governs succession to personal property — when bonds and notes of New York corporation not taxable under section 220(2) of the Tax Law, as amended.

The right of succession to personal property is governed by the law of the domicile of the owner at the time of his death.

Where decedent, who died intestate a resident of the state of California, at the time of his death there was the owner of and had in his possession certain bonds and promissory notes of a New York corporation whose principal asset was real property in this state, upon which said bonds and notes were not in any way a lien, and it also appeared that a tax under the Inheritance Tax Law of California had been assessed and paid upon said bonds and notes, which have not since the death of decedent come into the state of New York, they are not subject to a transfer tax here under section 220(2) of the Tax Law, as amended.

APPEAL from order assessing transfer tax.

Kellogg & Street, for administratrix.

Robert Wickert, for State Tax Commission.

NOBLE, S. The administratrix of Charles Kierstead Meyer, deceased, appeals herein from an order dated June 10, 1921, fixing and assessing a transfer tax upon the property of said decedent.

It appears that said decedent was a resident of the state of California and died in that state, intestate, on May 16, 1916.

He left an estate consisting of real and personal

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property, the real property in this state being located in Newtown, Queens county, appraised at a value of $20,000 and tax assessed on such valuation.

From this assessment there is no appeal and the question before me is the right of the state of New York to tax certain bonds and promissory notes of the Ivanhoe Company, a domestic corporation, which were owned by the decedent at the time of his death. The proof shows that the principal asset of the Ivanhoe Company consists of real property in this state, but there is no proof that the bonds or promissory notes are secured by any mortgage or are in any way made a lien upon such real property.

It is admitted that decedent was a resident of the state of California at the time of his death, and that said bonds and promissory notes were in his possession in California at that time, and have not since come within the state of New York. It also appears that a transfer tax under the inheritance tax law of the state of California has been assessed and paid upon said bonds and notes in that state.

The administratrix claims that the decedent, not having been a resident of the state of New York at the time of his death, and none of said bonds or promissory notes having come within the state of New York, they are not taxable, and the order assessing the tax upon them is erroneous and should be vacated.

In support of this contention, the attorney for the administratrix relies almost entirely upon the decisions in *Matter of Bronson,* 150 N. Y. 1, and the decision of the Appellate Division, first department, in *Matter of Barbour,* 185 App. Div. 445; affd., without opinion, 226 N. Y. 639.

Had the law at the time of the death of the decedent herein been as it was when the *Bronson* case was

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decided (October, 1896), I should have no hesitancy whatever in following the law as therein laid down and holding that the bonds and promissory notes were not taxable in this state.

Subsequent to the time of that decision, however, and before the death of the decedent herein, the Tax Law of this state was amended and the part pertaining to the issue herein reads as follows:

"§ 220. * * * 2. When the transfer is by will or intestate law, of tangible property within the state or of any intangible property, if evidenced by or consisting of shares of stock, bonds, notes or other evidences of interest in any corporation, joint-stock company or association wherever incorporated or organized, * * * and the property represented by such shares of stock, bonds, notes or other evidences of interest consists of *real property which is located, wholly or partly, within the state of* New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, in such proportion as the value of the real property of such corporation, joint-stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint-stock company or association or partnership, and the decedent was a nonresident of the state at the time of his death; or when the transfer is by will or intestate law of capital invested in business in the state by a non-resident of the state doing business in the state either as principal or partner."

Counsel for the respondent contends that the promissory notes and bonds in question are taxable under subdivision 2 of section 220 as above amended. In my opinion the question resolves itself into whether or not the legislature of the state of New

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York had the power to tax the succession in the ownership of the bonds and promissory notes arising through the death of the owner, under the circumstances heretofore stated. It cannot be presumed that the legislature intended to exceed its power, and the statute must be so construed as to avoid that result if possible.

Matter of Barbour, 185 App. Div. 445, was decided after the passage of the act above mentioned, but that case hinged practically upon the question of the domicile of the deceased, and the court held that it had been shown that he was a *bona fide* resident of the state of New Jersey, and the personal property in question having been physically held by him in that state it was improper to assess a tax upon it.

The transfer tax is a tax on the right of succession to the title of real or personal property arising through the death of the owner. The right of succession to real property is governed by the laws of the state in which it is situated, but such right as to personal property is governed by the law of the domicile of the owner at the time of his death.

As to this, Merrell, J., in *Matter of Barbour, supra,* citing, with approval, *Matter of Embury,* 19 App. Div. 214; affd., 154 N. Y. 746, says: "The right of the State to tax the estate of a deceased resident is upon the ground that by the favor of the State a right of succession in such property is accorded, and having granted such privilege of succession the State has the undoubted right to curtail the same by taxation, and so, appropriating a part of the estate with which to bear the expenses of the government under whose protection the estate has been accumulated and has existed. Unquestionably real property situated within the State owned by a non-resident is subject to taxation, as the property itself is here. And so, too,

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any personal property of a deceased person which may be physically present at the time of death can be laid hold of by the State for the purpose of taxation under our statutes. But as to personal property not physically within the State of New York, of a non-resident of this State, no such power exists. The very basis of such taxation, which is the right of succession, is wanting, because the succession thereto is created and governed by the law of the foreign State of which the deceased was a citizen."

And Judge Cullen, in *Matter of Gihon,* 169 N. Y. 443, says: "It is a tax not on property, but on succession; that is to say, a tax on the legatee for the privilege of succeeding to property. (*Knowlton* v. *Moore,* 178 U. S. 41.)"

In *Matter of Barbour,* on page 454, Mr. Justice Merrell says: "The right of the State to impose any tax is based on its dominion over the property situated within its territory. As was said by Gray, J., in *Matter of Bronson* (150 N. Y. 1, at the top of page 8): 'It is obvious that the State had no jurisdiction over a right of succession which accrues under the laws of the foreign State. That is something in which this State has no interest, and with which it is not concerned.' (*Matter of Swift,* 137 N. Y. 77; *Matter of Merriam,* 141 id. 484.)

"In *Matter of Houdayer* (3 App. Div. 474; 150 N. Y. 37) this court held that the power of the State to tax is limited to persons, property and business within its jurisdiction. In discussing, in *Matter of Houdayer,* the right of the State to impose a transfer tax, Mr. Justice Barrett said, at page 478: 'If it is upon the right of succession, then plainly it is a tax upon a right granted by a foreign State. If it is not a tax upon such right, then it is simply a tax upon property acquired through the instrumentality of a for-

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eign succession law. And that in substance is what it is. In common parlance it is a succession tax. But in legal parlance it is, as was intimated in *Matter of James* (144 N. Y. 10), 'a tax upon property in this State passing from non-resident decedents.' The latter case distinctly holds that 'It is the property of the decedent which is sought to be subjected to the tax;' and that 'The right of the State to impose the tax is based upon its dominion over what property is situated within its territory.'"

In the case of bonds and promissory notes, as I look at it, the corporation would undoubtedly have made some provision to meet them on maturity by an amortization or sinking fund, and if the corporation were solvent such bonds and notes would be taken up on maturity by payment from such fund and there would be no cause for resorting to the real property. Even if the bonds and notes were secured by a mortgage or other lien on the real property, which is not shown to be the case here, the lien would be merely a further security, and the holders of the bonds and notes would have no interest in the realty unless their bonds and notes could not be satisfied from the proper funds.

I am of the opinion, accordingly, that the bonds and notes are not properly taxable under the law of taxable transfers of this state, and that the matter should be referred back to the appraiser for amendment of his report, in accordance with this opinion

Enter decree accordingly.

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JAMES E. McDONALD and CATHERINE McDONALD, as Executors of the Estate of FRANK B. McDONALD, Deceased, and Another, Plaintiffs, *v.* NORA M. O'HARA et al., Defendants.

(Supreme Court, New York Special Term, December, 1921.)

Injunction — waste — landlord and tenant — equity — landlord can restrain tenant from materially changing nature of building, though value enhanced by alteration — mandatory injunction granted directing assignee of lease to restore premises.

The rule of the common law that a tenant is guilty of waste if he materially changes the nature and character of the building leased, even though the value of the property is enhanced by the alteration, is still the law in this state.

Without the consent of the owners in fee or of the mortgagee in possession, a corporation whose only asset was an assigned lease of corner premises in the city of New York completely changed the interior arrangement of the rear or westerly end of the premises by removing some partitions and erecting others, and by placing the wooden framework for a store front on one side of the building at or near the place where there had been two brick piers before their removal by the corporation in compliance with an order of the building department. In an action to restrain waste the relief asked for was a mandatory injunction directing the restoration of the premises to the original condition. *Held,* that the assignee of the lease was chargeable with knowledge of the law, and must be held to strict accountability for its acts, and the plaintiffs granted the judgment as prayed for, with a further direction that no further alterations be made without the consent of plaintiffs.

The order of the building department which expressly directed that the brick piers, after removal, be properly replaced and rebuilt in a secure and lawful manner, was no protection to the assignee of the lease, nor was the advice of its counsel that it could make the alterations complained of, an excuse.

A contention of the assignee of the lease that the injunction would interfere with its rental profits is not entitled to consideration because there being no adequate remedy at law equity would intervene to protect the plaintiffs' rights.

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ACTION for injunction to restrain waste.

Allan C. Rowe, for plaintiffs.

Morris Popper, for defendants Oras Realty Co., Inc., R. B. L. Co., Inc., and Hughes.

George L. Donnellan, for defendant O'Hara.

LYDON, J. This is an action for an injunction to restrain waste on the premises at the south-west corner of Thirty-ninth street and Sixth avenue, in the borough of Manhattan, city of New York. The plaintiffs seek to restrain the removal of two brick piers on the Thirty-ninth street side of the said premises; the alteration of the ground floor, changing the partitions thereof, and restraining the making of any alterations which materially and permanently change the nature of the leased property. The plaintiffs also ask for a mandatory injunction directing the defendants to restore the premises to its original condition, and pray for incidental damages.

The evidence shows that the two brick piers were completely removed and the partitions were erected in the premises prior to the service of the injunction order; consequently, the only remaining question to be determined is whether or not the plaintiffs are entitled to a mandatory injunction directing the defendants to restore the premises to their former condition, and to determine whether or not any damages are payable to the plaintiffs by reason of the acts of the defendants in so changing the premises without the consent of the owners or the mortgagee in possession.

Upon the trial, by consent, the action was dismissed as to the defendants R. B. L. Company, Inc., and Peyton M. Hughes.

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The premises are now held by the defendant Oras Realty Co., Inc., under an assignment of a lease from the defendant Nora M. O'Hara, a former lessee. The owners of the property are the plaintiffs, James E. McDonald and Catherine McDonald, as executor and executrix of the estate of Frank B. McDonald. The term of the lease in question expires in January, 1932.

The defendant Oras Realty Co., Inc., is a corporation, the entire stock of which is owned by Mr. Abraham Levy and a Mr. Rudinger. According to the testimony of Mr. Levy he bought the stock of the Oras Realty Co., Inc., the only asset of which was this lease, after he, through his lawyer, had examined the lease, and after he had made inquiries of his attorney as to whether or not he had the right to make alterations, because that was one of the moving reasons why the lease was bought. Mr. Levy further testified, very frankly, that it was his intention prior to and after the purchase, to make the very alterations that are now complained of, and that he took his builder up to the premises and got from him an estimate of the cost of the making of these alterations. On that inspection by the builder it was discovered that there was a large crack in the brick wall in the upper part of the premises, and the attention of Mr. Levy was called to it, and he was advised that the premises were probably dangerous in their then condition. At that meeting it was decided that the builder would prepare and file the necessary plans for the alteration. This was done. Some few days after the plans were filed an inspector from the building department examined the premises and discovered the defective wall and filed an *unsafe notice* against the premises, as follows:

"You are therefore required to make same safe and secure by doing the following work — and as soon as

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this work has been done, you will please notify this Bureau requesting an inspection:

"By properly bracing and shoring, and removing the defective brick piers of first story, north wall, and all cracked and loose brickwork of large second story pier, properly replacing and rebuilding same in a secure and lawful manner, and by removing all loose plastering of ceilings forthwith."

Shortly thereafter, the plans as filed were approved, and early in March, 1920, work was commenced on the premises toward the removal of the brick piers on the first floor, the shoring up of the building, and the repair of the defective wall in the upper part. So far as the removal of the brick piers was concerned, undoubtedly that was in compliance with the order of the building department, and also, it may be said, that the substitution of the new twelve inch I-beams to support the upper wall, was also a compliance with the requirements of the building department. But, the defendant Oras Realty Co., Inc., proceeded to go further, and that is, they completely changed the interior arrangement of the rear or westerly end of the premises by removing some partitions, and erecting others, and by placing the wooden frame work for a store front on the Thirty-ninth street side at or about the place where the two brick piers were formerly located.

The application for a mandatory injunction herein is resisted by the defendant Oras Realty Co., Inc., upon the ground that in removing the two brick piers it was only complying with the *unsafe order* of the building department. An examination of this order discloses that it did direct the removal of the said brick piers, but at the same time it also required the piers to be replaced and rebuilt in a secure and lawful manner. Even assuming that the direction for the

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rebuilding of these piers was upon the theory that they were the supporting force of the wall immediately above, as the iron girder was not visible from the outside, nevertheless, it is immaterial that the said brick piers are not necessary for such support. It is not sufficient for the Oras Realty Co., Inc., to claim that it has complied with the building department order, as well as all requirements that the plaintiffs could demand, by supporting the wall with two twelve inch I-beams. The order of the building department affords no protection to the defendant Oras Realty Co., Inc., and it cannot take refuge behind it, as the said order clearly directed that the said piers, after removal, be *properly replaced and rebuilt in a secure and lawful manner.*

The law is well settled as to the rights and limitations of a tenant in the use of real property. In the case of *Agate* v. *Lowenbein,* 57 N. Y. 604, 607, the court said: "Had there been no license given to the defendants to do the acts of which the plaintiff complains, the injuries done to the property would have been, apparently, acts of waste, for which the plaintiff could, by the rules of the common law, have brought an action on the case in the nature of waste. (2 R. S. 384; Taylor on Landlord & Tenant, sec. 348 and cases.)

"The right which the tenant has is to make use of the property. The power of making an alteration does not arise out of a mere right of user; it is, therefore, incompatible with his interest for a tenant to make any alteration, unless he is justified by the express permission of his landlord. (Taylor, sec. 348.) Holroyd, J., in *Farrant* v. *Thompson* (5 B. & Ald. 826) defines the extent of a lessee's rights. By a lease the use, not the dominion of the property demised, is conferred. If a tenant exercises an act of ownership, he is no longer protected by his tenancy."

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Again, at page 614, the court said: "It is, in general, no justification for an act of waste that a party will, at some future time, put the premises in the same condition as they were when the lease was made. The question is, whether the tenant, at the time the wrongful act was done, caused an injury which then affected the plaintiff as to his reversion. * * * The tenant has no right to exercise an act of ownership."

In the case of *Kidd* v. *Dennison*, 6 Barb. 9, 13, the court said: "So if a tenant materially changes the nature and character of the buildings it is waste, although the value of the property should be enhanced by the alteration. * * * The tenant has no authority to assume the right of judging what may be an improvement to the inheritance. He must confine himself to the conditions of the lease."

Aside from the above decisions, it is an old principle of the common law that a tenant is guilty of waste if he materially changes the nature and character of the building leased. Many authorities, both English and American, declare that such changes will be deemed waste, even though the value of the property would be enhanced by the alteration. This rule of the common law has been relaxed or partially repudiated by a number of courts in more modern times. But it is still the law in this state, and I think it is well founded upon the just and controlling consideration that the owner of the property is entitled to have it remain as it is, without material change in its structure, form and character, except in so far as he has consented thereto by express agreement.

The plaintiffs, in my opinion, are entitled to a mandatory injunction for the restoration of the premises to the condition they were in before the work of destruction took place. It clearly appears that the

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defendant Oras Realty Co., Inc., under the guise of the building department order, sought to carry out its original intention to make this alteration by converting the westerly end of the premises into a store, without the consent of the owners of the fee, or the mortgagee in possession. The defendant Oras Realty Co., Inc., cannot complain when it is compelled to restore the premises to its former condition, because it is chargeable with knowledge of the law, and notwithstanding the advice of counsel that it could make these alterations, that is no excuse, and the said defendant must be held to a strict accountability for its acts.

The defendant Oras Realty Co., Inc., must, therefore, remove the frame work for the store front on the Thirty-ninth street side, rebuild the piers, and restore the side entrance door and window; also remove the partitions recently built converting the candy store into a large store and making other subdivisions in the interior, and in their place erect partitions corresponding to those that formerly existed and which the defendant Oras Realty Co., Inc., removed. It is further ordered that the defendants make no further alterations in the said premises without the consent of the plaintiffs.

In directing a mandatory injunction, I am not unmindful of the argument made by the attorney for the defendant Oras Realty Co., Inc., that the court should not grant a mandatory injunction in this class of cases, especially as the rights of innocent third parties have intervened. By innocent third parties he means the sub-tenants of the defendant Oras Realty Co., Inc. The record shows that this original lease which expires in January, 1932, reserves a rental of $6,000 a year, while the defendant Nora M. O'Hara assigned the said lease to the defendant Oras Realty

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Co., Inc., at a rental of $9,500 a year, and the defendant Oras Realty Co., Inc., is now receiving from its various tenants an aggregate rental of $15,500 a year. To be sure, when the defendant Oras Realty Co., Inc., restores the premises, the rental value will be reduced, but this is no argument as to why the plaintiffs should not have what they are properly entitled to. To my mind, the said plaintiffs have not an adequate remedy at law. The cost of replacement was established by the plaintiffs' witness Marshall as from $1,200 to $1,500, while the defendants' witness Hughes testified that the cost would be approximately $600. This is not such an excessive amount as to deter the court from granting equitable relief to the plaintiffs. The plaintiffs are the sole judges as to what improvements shall be made on their property. It is not for the lessees to improve in accordance with their wishes, and make various subdivisions of the whole, thereby creating two or three stores where only one formerly existed, and then rent these smaller stores at high rentals. Such procedure is in absolute violation of the rights of the plaintiffs, with the resultant enrichment of the defendants at the expense of the plaintiffs' rights. To withhold a mandatory injunction under the facts of this particular case would open the door for fraud. It would be equivalent to saying, that if a lessee could, through quick and artful action, alter a building and rent the same to various tenants, before the landlord obtained knowledge of the circumstances, the landlord would not be entitled to a mandatory injunction, even though the lessee is guilty of waste, simply because the rights of innocent third parties had intervened. It is quite evident to my mind that the defendant Oras Realty Co., Inc., is not so much concerned in the rights of the innocent third parties as it is in the fact, that it means a monetary

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loss to it, in rental value, when it restores the premises. Surely, the Oras Realty Co., Inc., cannot expect this court to put its stamp of judicial approval upon its wanton acts in violation of the plaintiffs' rights. The high rentals that are being exacted today are due, in a large measure, to precisely such practices as this record discloses, to wit: the sale, re-sale, and assignment and re-assignment of leases, each turn-over at a profit to the holder, with a corresponding increase in rent to the sub-tenant. It is, therefore, quite clear that the only reason why the defendant Oras Realty Co., Inc., resists the application for a mandatory injunction, is, that it will interfere with its rental profits, but this argument has no place in a court of equity when the plaintiff's rights have been trampled upon. These operators must confine themselves to the expressed and implied covenants of the lease, because equity will always intervene to protect property rights where the remedy at law is inadequate.

As to the question of damages, the plaintiffs' counsel stated upon the trial that the plaintiffs would not seek money damages and that the proof offered of replacement value was presented only to show the materiality of the alterations. It is, therefore, unnecessary to discuss the question of damages, as the same were waived.

Judgment for the plaintiffs, with costs. Submit findings.

Judgment for plaintiffs.

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PEOPLE ex rel. JOHN J. ALLEN, Relator, *v.* JOHN WAGNER, as Sheriff of Queens County, Respondent.

(Supreme Court, Queens Special Term for Motions, December, 1921.)

Contempt — civil — non-payment of alimony — order need not recite that sequestration is unavailing — habeas corpus — affidavit held sufficient — writ dismissed — Civ. Pr. Act, § 1172.

An order adjudging relator guilty of a civil contempt for non-payment of alimony is valid though it does not contain a finding that sequestration is unavailing.

Where on the return to a writ of habeas corpus, seeking relator's discharge from imprisonment under an order adjudging him in contempt for non-payment of alimony, no traverse being filed, it appears, from plaintiff's affidavit used on the motion for alimony, that she was informed by her attorney that defendant had a certain interest in some real property which was worth $10,000, and the affidavit further stated that defendant had no other personal property from which sequestration could be made, the requirements of section 1172 of the Civil Practice Act (Code Civ. Pro. § 1773) are met and the writ will be dismissed and the relator remanded.

HABEAS corpus.

Charles Foley, for relator.

Thos. W. Constable, for respondent.

CROPSEY, J. The relator by this writ of habeas corpus seeks his discharge from imprisonment under an order adjudging him guilty of a civil contempt — the non-payment of alimony. The main question involved is whether the order adjudging him in contempt should have contained the finding that sequestration proceedings would have been unavailing. It

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does not contain any reference to that matter. I think the order is good without such a provision. Before the court can make such an order it must be satisfied that payment cannot be enforced by means of sequestration. Code Civ. Pro. § 1773; Civil Practice Act, § 1172. But there is no provision in this section or elsewhere, so far as I know, that requires such a finding to be contained in the order adjudging one in contempt. And a committal order is good which recites the facts that constitute the offense. It need contain nothing else unless so required by statute. There is such a requirement concerning the finding that the act in question has defeated or impaired the rights of the other party. Judiciary Law, §§ 770, 772. And because of those provisions the order must contain such a finding. *Schweig* v. *Schweig, No.* 2, 122 App. Div. 787, 789. As there is no statutory requirement that the order shall contain a finding that sequestration is unavailing the order is valid without it. *Davison's Case,* 13 Abb. Pr. 129, 139; *Ryer* v. *Ryer,* 33 Hun, 116; *Distasio* v. *Distasio,* 26 Misc. Rep. 491.

There is no traverse to the return and the only question here is whether the court had jurisdiction to make the committal order and whether the provisions thereof were within its power. *People ex rel. Pellecchio* v. *Sheriff of Kings County,* 158 App. Div. 946. But even if we look behind the order and at the papers upon which it was granted, I think sufficient appears to have satisfied the court that sequestration would have been unavailing. The affidavit of the plaintiff in the matrimonial action stated that she had been informed by her attorney that the defendant had a one forty-eighth interest in some real property which was worth about ten thousand dollars. The same affidavit contained the further allegation " that

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the defendant has no other personal property from which sequestration could be made." While there must be something to satisfy the court that the payment of the money cannot be enforced by sequestration (*Haas* v. *Haas*, 197 App. Div. 619, 622), that fact does not have to appear in any particular form. *Uttal* v. *Uttal*, 140 id. 255. I think the allegations in the papers in question are sufficient to meet the requirements of the statute.

Writ dismissed. Relator remanded.

PEOPLE ex rel. DANA WALLACE, District Attorney of Queens County, Relator, *v.* ADAM CHRISTMANN, a Justice of the Municipal Court of the City of New York, and Others, Respondents.

(Supreme Court, Queens County, December, 1921.)

Intoxicating liquors — seizure without warrant in private dwelling — when writ of prohibition will not issue to restrain replevin — Code Crim. Pro. § 802-b.

Where, without a search warrant, liquors are seized in and taken from the private dwelling of the owner of the liquor, an action in replevin lies, and a motion to restrain the trial of the action pending the disposition of a proceeding *in rem* under section 802-b of the Code of Criminal Procedure against the liquor so seized, will be denied.

APPLICATION for writ of prohibition.

Joseph Lonardo, assistant district attorney, for motion.

William J. Spalckhaver, for respondent Hufner.

CROPSEY, J. The district attorney seeks a writ of prohibition to restrain a Municipal Court justice from

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trying an action in replevin to recover the possession of liquor seized without warrant from the private dwelling of the plaintiff in the replevin action. The legislation passed early this year (Laws of 1921, chaps. 155, 156) prescribes certain proceedings and remedies in the enforcement of prohibition. Among other things a proceeding *in rem* against seized liquor is provided under certain conditions, and where such proceedings lie I think it was the intention of the legislature to have the seized liquor kept in official custody until the determination thereof. Chapter 156, above mentioned, adds section 802-b to the Criminal Code. It provides for the seizure under a search warrant of liquor illegally possessed. It states that liquor thus seized "shall not be taken from the custody of the peace officer making the seizure by a writ of replevin or other process, while the proceeding or trial is pending." Later on the same section provides that "Whenever a peace officer shall find any person * * * in the unlawful possession thereof [of intoxicating liquor] outside of his private dwelling, he may, without a warrant, seize any and all such intoxicating liquor * * *." The officer so seizing the liquor must make a return of his proceedings as provided, which return shall be deemed a complaint "and the provisions of this section relating to proceedings for seizure pursuant to a warrant shall apply to such liquor * * *." From these provisions I think it plain that where liquors are seized without a warrant, provided the seizure was under the conditions permitted by the statute referred to, they shall be kept in the possession of the peace officer pending the disposition of the trial and proceeding the same as if they had been seized under a warrant. In the present case the liquors were taken from the private dwelling of the person who claimed the ownership of them and the

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lawful right to retain them. The criminal charge against that person has been dismissed. The proceeding *in rem* against the liquor is still pending. The alleged owner of the liquor has sued in the Municipal Court in replevin to recover it. If the seizure of the liquor had been made as provided by the statute in question, although without a warrant, I should have no hesitancy in holding that the replevin action could not be maintained pending the disposition of the proceeding *in rem*. But the seizure was concededly without right. The liquor was found in and taken from the private dwelling of its owner without a warrant. This is not permitted by the statute. In fact possession of liquor in a person's private dwelling is excepted from the list of cases in which it may be seized without a warrant. And where there has been such an illegal seizure there is no basis for the proceeding *in rem*. For the purposes of this case the situation is the same as though the statutes above mentioned had not been passed. Hence it follows that the owner of the liquor may maintain his action in replevin to recover it.

Motion denied.

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MORTIMER DANIEL LIEBERMAN, an Infant, by MAY LIEBERMAN, his Guardian ad Litem, Appellant, v. SHEFFIELD FARMS — SLAWSON DECKER CO., INC., Respondent.

(Supreme Court, Appellate Term, Second Department, December, 1921.)

Warranty — sale of bottled milk — implied warranty that milk is fit for human consumption — distributor held liable for illness of child caused by worms in milk.

Upon a sale of milk to be used as food there is an implied warranty of its fitness for human consumption even though the seller is merely a distributor of the product.

Race v. *Krum*, 222 N. Y. 410, followed.

The mother of plaintiff having bought of defendant a standard quart bottle of "Certified Milk" which was produced at the Wilmarth Farms, Kingsley, Penn., and sealed in conformity with the standards of the Kings County Medical Society, added boiled water to a portion of the milk for the use of plaintiff who was then eighteen months old and who toward evening on the same day became ill. An examination by the child's father showed small worms attached to the inside of the glass bottle and the remainder of the milk was kept and delivered by the guardians of the child to their family physician. In an action for negligence the complaint alleged *inter alia* that the illness of the child was due to the carelessness, recklessness and negligence of the defendant in the preparation of the milk and without contributory negligence on the part of the infant plaintiff or that of his guardian *ad litem*, and further, that the milk was unfit for human consumption and contained worms which caused the infant plaintiff to become ill. The family physician's diagnosis was gastrointeritis or inflamed condition of the stomach and intestines, and he testified that the inner surface of the bottle was saturated with little organisms or worms and that the nearest thing he could compare them with was "dragon fly larvae," and he also testified that the presence of these organisms in the milk was a competent producing cause of the child's illness.

The physician who was authorized by the Kings County Medical Society to pass upon the milk produced at the Wil-

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marth Farms testified that, on one occasion, four years prior to the one in question, worms were present in the milk and indicated that these worms came from a reservoir used for the storage of water; that the worms had gotten into the reservoir from the surface, and that the water was used to wash the rims of the bottles and in that way the worms got into the bottle. It also appeared that the bottles and the caps which sealed them were furnished by the defendant, who was merely the distributor of the milk, but that the actual bottling and sealing thereof was done at the Wilmarth Farms, and that no employees of the defendant were employed there nor was any employee of defendant engaged in the bottling process. The trial justice after granting plaintiff's motion to amend the complaint to conform to the proof so as to claim to recover upon the theory of an implied warranty in the sale of the milk, and in the mistaken belief that such was the only cause of action, dismissed the complaint upon the merits. Upon reversing the judgment entered in favor of defendant and ordering a new trial, *held*, that the mere purchase of the milk made known to defendant that it was required for food; that as any one reading the printed matter on the label, "Sheffield Farms Co., Inc., Bottled at Wilmarth Farms," might well assume that the milk was the product of defendant's farm, the plaintiff had a right to assume that defendant had the opportunity to examine the milk.

APPEAL by plaintiff from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, fourth district, in favor of defendant and dismissing plaintiff's complaint on the merits.

Emanuel Sustick, for appellant.

Arthur J. Peck, for respondent.

KELBY, J. On the 23d of August, 1919, the plaintiff's mother and present guardian *ad litem* bought from the defendant a quart bottle of "Certified Milk." This milk was for the use of the infant plaintiff, who was then eighteen months old. The certified milk was contained in a standard quart milk bottle and had

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embossed on the sides thereof the following words: "Sheffield Farms Slawson Decker Co." The bottle was tightly sealed when received by the buyer and the caps were on very tight. The cap or paper hood which sealed the bottle, among other things, had printed on it the following: "Sheffield Farms Co. Inc. Bottled at Wilmarth Farms." These words were arrayed in the form of a circle, and in an inner circle on the paper hood were contained the following words: "Milk Commission of the Medical Society of the County of Kings." Also in circular form and further within the circle was the legend "Grade A Raw" and the word "Certified" in large letters in red ink, and in small letters under the word "Certified" appeared in smaller type the words, "Milk shipped from Kingsley, Pa.," followed on a single line by the word "Tuesday" in red ink. This bottle of milk was opened by the plaintiff's mother, who added to the milk boiled water, the milk so diluted to be used by the infant plaintiff as food. Toward evening, on the same day, the infant plaintiff became sick. An examination of the bottle by the plaintiff's father showed small worms attached to the inside of the glass bottle. The remainder of the milk was kept by the plaintiff's guardians and delivered to their family physician. The physician when called testified that the child had a temperature of 101, was vomiting, had a green stool, and had a distended abdomen; and the physician's diagnosis was gastrointeritis or inflamed condition of the stomach and intestines. The same doctor also testified that the inner surface of the bottle containing the milk was saturated with little organisms or worms, and that the nearest thing he could compare these organisms with were "dragon fly larvae." The doctor also testified that the presence of these organisms in the milk was a competent producing cause for the child's illness.

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The doctor called by the defendant and who was authorized by the Kings County Medical Society to pass upon the milk produced at the Wilmarth Farms testified that, on one occasion, four years prior to the one in question, worms were present in the milk. The doctor indicated that these worms came from a reservoir used for the storage of water and that the worms had gotten into the reservoir from the surface, and that the water was used to wash the rims of the bottles and in that way the worms got into the bottle.

The complaint in the action proceeded upon the theory of negligence, alleging, among other things, that the illness of the infant was due to the carelessness, recklessness, and negligence on the part of the defendant in the preparation of said milk and without any negligence on the part of the infant plaintiff, or that of his guardian, contributing thereto. The complaint also contained an allegation that the milk was entirely unfit for human consumption and contained worms, and that these caused the infant plaintiff to become sick.

At the close of the testimony the plaintiff moved to amend the complaint to conform to the proof "and also to raise the question — proceed on the theory of implied warranty on the part of the defendant; that milk sold by the defendant to the plaintiff or any other consumer is warranted as being fit for human consumption." The court allowed this amendment.

The learned trial justice in rendering his decision on the case stated: "Upon the trial it was conceded that the defendant was guilty of no negligence. But the plaintiff claims on the theory that there was an implied warranty in the sale of the milk." According to the record, just quoted above, this was clearly a misapprehension, the plaintiff standing both on the action of negligence and also on that of implied war-

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ranty. It thus appears that the court did not pass upon any alleged claim or cause of action for negligence.

It appears from the evidence that the milk in question was "certified milk," and that it was produced at the Wilmarth Farms, Kingsley, Penn. That the bottles and caps were furnished by the defendant, but that the actual bottling and sealing thereof was done at the Wilmarth Farms, and that no employees of the defendant were employed at the Wilmarth Farms, nor was any employee of the defendant engaged in the bottling process. The defendant corporation was a distributor of the milk.

The court below believing that there was but one cause of action, an implied warranty, before it for decision, rendered judgment in favor of the defendant. In making this decision the court relied upon certain expressions in the opinions in *Race* v. *Krum*, 222 N. Y. 410, 415; *Zenkel* v. *Oneida County Creameries Co.*, 104 Misc. Rep. 251, 252; *Rosenbusch* v. *Ambrosia Milk Corp.*, 181 App. Div. 97, 100. The first two are cases resting on an implied warranty, and the third rested upon negligence alone.

The term "Certified Milk" is defined in section 32 of the Agricultural Law, which reads in part as follows: "No person shall sell, or exchange or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk, or any cream from the same, * * *. No person shall sell or exchange, or offer or expose for sale or exchange, as and for certified milk, any milk which does not conform to the regulations prescribed by and bear the certification of a milk commission appointed by a county medical society organized under and chartered by the medical society of the state of New York and which has not been pronounced by such authority to

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be free from antiseptics, added preservatives, and pathogenic bacteria, or bacteria in excessive numbers. All milk sold as certified milk shall be conspicuously marked with the name of the commission certifying it."

The rules and regulations of the department of health, which are effective and have the force of ordinances in the city of New York, provide as follows: "Certified Milk is milk certified by a Milk Commission appointed by the Medical Society of the County of New York, or the Medical Society of the County of Kings, as being produced under the supervision and in conformity with the requirements of that Commission as laid down for certifying, and sold under a permit therefor, issued by the Board of Health."

It is also provided that "The milk should be delivered to the consumer only in sealed bottles which have been sealed at the dairy."

The bottle of milk in question was sealed in conformity with the standards of the Kings County Medical Society.

The case of *Rinaldi* v. *Mohican Company*, 225 N. Y. 70, construes section 96 of the Personal Property Law, which has reference to implied warranties of quality. Subdivision 1 of that section reads as follows: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

In that case the court held that "Article 5 of the Personal Property Law is not merely a codification of the existing rules regarding sales in this state. It

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was the design as far as possible to make our law uniform with the legislation and laws on this subject existing throughout the country. To this end changes were made in what had previously been here the law. In section 96 itself, for instance, the distinction between the liability of sellers who were growers and manufacturers and others was ended. * * * Having in view the purpose of the article and the fact that in some states no implied warranty based on grounds other than those which affect every sale of a chattel was enforced, we have no doubt that section 96, expressed as it is in general terms, applies to all sales, including sales of food, and that any rules hitherto applied inconsistent with this section are abolished.

"In a sale of food, therefore, there is no longer an implied warranty of fitness unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase and unless it appears that the buyer relies on the seller's skill or judgment. * * * The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of an implied warranty. If either of these two facts do not appear he fails in his claim. * * *

"We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inferences. In this we agree with the courts of Massachusetts. (*Farrell* v. *Manhattan Market Company*, 198 Mass. 271-279.) But we think further that such a purchase, where the buyer may assume that the seller has the opportunity to examine the article sold, unexplained, is also conclusive evidence of reliance on the seller's skill or judgment."

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Applying the foregoing to the facts at bar the mere purchase of the milk in this case by the buyer made known to the seller the purpose for which the article was required, namely, that of food. And from the facts disclosed the buyer might also assume that the seller had the opportunity to examine the milk. Any one reading the printed matter on the label might very well assume that the milk was the product of the defendant's farms. The fact that the milk was certified by the Kings County Medical Society as meeting the requirements of the statute and the regulations as to certified milk has not changed the situation. In *Rinaldi* v. *Mohican Company, supra*, the plaintiff bought a loin of pork at a market owned by the defendant. The meat was infested with trichinae, which are small worms. The pork had been inspected by officials of the United States government and bore a government stamp to the effect that the pork was sound and fit for consumption and free from defects, and the defendant in that case, as in this, strenuously insisted that the worms could not have been discovered on inspection. The fact that the milk in this case was certified by a medical society pursuant to the statute can have no greater effect than the inspection of the federal authorities of the meat in the *Rinaldi* case.

It is true that the Court of Appeals in *Rinaldi* v. *Mohican Company, supra,* stated that they did not pass upon the question as to whether the rule of law therein established applied to a sale in the original package bought from others.

Since the decision in *Rinaldi* v. *Mohican Company, supra,* the highest courts of other states have interpreted this same uniform Sales Act. In the case of *Ward* v. *Great Atlantic & Pacific Tea Company,* 231 Mass. 90, it appeared that the defendant conducted

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a retail grocery store, and had for sale at this store beans in sealed all-tin cans, bearing this label: "Grandmother's Brand A & P Beans & Pork with Sauce, contents 2 lbs. 1 oz." "Remove contents of this can as soon as opened and place in earthenware dish." "The Great Atlantic & Pacific Tea Co., Incorporated, Distributors, Jersey City, N. J., U. S. A." The defendant in that action purchased the cans of beans from the Thomas Canning Company, of Grand Rapids, Mich., after canning, and the defendant furnished the labels, which were affixed to the cans by the manufacturer. The defendant had no supervision over the process of canning, and no knowledge or means of knowledge that any foreign substance was in the cans. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company was an independent, reputable manufacturer of canned goods, and in its processes employed all modern methods to prevent the presence of foreign substances in its products. The defendant sold to the plaintiff, the buyer in that case, one of these sealed cans of beans. Among the beans was a small pebble, and the plaintiff in ignorance of the presence of the pebble and while eating of the beans broke his tooth on the pebble, and later, on account of the injury, was obliged to have his tooth extracted. The court in its decision cited the very same section, identical in phraseology, of the Sales Act as is relied on here. The court there held the defendant liable, and in its opinion states:

"The cans were sealed. Their contents could not in the nature of things be open to inspection before the sale. There could be no intelligent selection based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a

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retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or trade name. The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance, as in *Farrell* v. *Manhattan Market Company,* 198 Mass. 271. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express statement to the contrary, this must be regarded as a necessary inference from the relation of parties.

"There appears to us to be no sound reason for engrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. * * * It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer."

The Massachusetts court then cites with approval *Frost* v. *Aylesbury Dairy Co., Limited,* (1905) 1 K. B. 608, which related to a sale of milk by a retail dealer. This case, as well as *Jackson* v. *Watson & Sons,* (1909)

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2 K. B. 193, both arose under the English Sale of Goods Act, which does not differ in any particular material from the provisions of the Massachusetts and New York act. "Decisions of this character, in view of the fact that the English sale of goods act was enacted before our own, and of the close similarity of the pertinent section of each act, are entitled to consideration." See *McNicol's Case,* 215 Mass. 497, 499; *Wiedeman* v. *Keller,* 171 Ill. 93; and *Sloan* v. *Woolworth Co.,* 193 Ill. App. 620. See, also, cases cited in note, 5 A. L. R. 242, and in *Farrell* v. *Manhattan Market Company,* 15 L. R. A. (N. S.) 884.

Under the rules of law above referred to the defendant was liable on implied warranty, and what was said in *Race* v. *Krum,* 222 N. Y. 410, 415, can be said with equal propriety as to the reason for the result reached in this case; although in the case of *Race* v. *Krum* the defendant was the manufacturer of the ice cream and not merely the distributor as in the case at bar. In that case the court said: "The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one but public policy as well as the public health demand such an obligation should be imposed."

The judgment appealed from is reversed and new trial ordered, with thirty dollars costs to appellant to abide the event.

CROPSEY, J., concurs; LAZANSKY, J., concurs in result.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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RICHMOND WEED and Another, Appellants, v. MATTHEW W. CARSWELL, Respondent.

(Supreme Court, Appellate Term, Second Department, December, 1921.)

Landlord and tenant — rent — cities of the first class — action for use and occupation against tenant holding over term — when tenant may attack increased rent as unjust — tenancies from month to month — when thirty days' notice of termination necessary — in absence of such notice, rent formerly agreed upon only recoverable — effect of prior adjudication of rental value — tender — bill of particulars must be filed before issue is joined — Laws of 1882, chap. 303, as amended by Laws of 1889, chap. 357, and Laws of 1920, chap. 209 — Laws of 1920, chaps. 942, 944 — Laws of 1921, chap. 434, § 7.

Under the statute (Laws of 1920, chap. 944) which suspends the right of a landlord to regard a tenant holding over, either as a trespasser or as a tenant for a renewal of the term at the same rent, and permits the tenant to remain in possession without the permission of the landlord, an action for use and occupation lies against the tenant holding over his term, in the absence of any new agreement.

Even if a new agreement is made the rent reserved thereby may be attacked by the tenant as unjust and unreasonable on the first day that it accrues, in which case there is no necessity for the landlord to notify the tenant that after the expiration of his original term, use and occupation will be at the increased rate.

In the case of tenancies from month to month or monthly tenancies, however, a different rule applies, because under the statute (Laws of 1920, chap. 209, amending chapter 303 of the Laws of 1882, as amended by chapter 357 of the Laws of 1889), which was clearly intended to prevent a tenant from being dispossessed unless he has received at least thirty days' notice of the termination of his existing agreement, which statute has not been repealed, such a tenant, in the absence of service of the notice to quit therein provided for, has the right to occupy the premises for another month at the same rent, and summary proceedings under chapter 942 of the Laws of 1920 must still be predicated upon this statutory notice to quit.

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The landlord, therefore, in an action brought against either a monthly tenant or a tenant from month to month for use and occupation or upon an implied agreement for an increased rental, must serve the tenant with a thirty days' notice stating that he elects to terminate the tenancy, and in the absence of such notice only the former monthly rent agreed upon may be recovered; any other course would nullify the provisions of chapter 209 of the Laws of 1920.

The complaint in an action for use and occupation alleged that the defendant entered into possession of the premises for dwelling purposes under a written lease for two years and therein agreed to quit and surrender the premises at the expiration of the term, but that he failed so to do and continued in possession of the premises. The answer following a denial of the reasonable value as set forth in the complaint alleged as a defense that the action was for rent under an implied agreement for use and occupation and that the rent demanded was unjust and unreasonable, presumptively so pursuant to statute, and that the implied agreement under which a recovery was sought was unjust, unreasonable and oppressive, and it was further pleaded that without the consent of defendant the rent sought to be recovered had been increased about seventy per cent over the rent as it existed one year prior to the alleged implied agreement. *Held*, that defendant was not a trespasser but was simply in lawful possession of the premises and was liable to plaintiff for use and occupation and that the dismissal of the complaint was error.

A defense of tender held not sustained, it appearing that plaintiff upon refusing to receive a check tendered by defendant, as rent, stated that he would consider accepting it as a tender of payment for the use and occupation of the premises.

It was agreed that in a prior action commenced December 10, 1920, between the same parties to recover the rental value for the use and occupation of the premises for the thirty days succeeding the expiration of the term under the written lease the jury on January 5, 1921, rendered a verdict in an amount which was an increase of about ten per cent over the rent reserved in the pre-existing lease and that the judgment entered upon such verdict was paid and satisfied, and no appeal from the judgment taken. It was further agreed that at the commencement of the present action defendant had paid nothing for his occupancy from December 10, 1920, to May 5, 1921, except that, with his answer, he deposited in court a certain sum

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which was at the rate allowed by the verdict in the prior case. *Held*, that though there was no allegation in the complaint of any prior adjudication of any rental value of the premises as found by the jury in the prior case and no allegation of a change of conditions, the statement in plaintiff's bill of particulars that the taxes for 1921 exceeded those of 1920 in a certain amount met the requirements of the statute (Laws of 1921, chap. 434, § 7) and was a sufficient plea of the facts affecting the rental value of the premises, which arose since the period as to which the prior adjudication had been made.

The main purpose of the bill of particulars required by the statute (Laws of 1920, chap. 944) is to fairly apprise the tenant of all the facts upon which the value of the premises should be predicated and in terms provides that issue shall not be joined until the filing of such a bill of particulars.

APPEAL by plaintiffs from a judgment of the Municipal Court of the city of New York, borough of Queens, fourth district, dismissing plaintiffs' complaint. The action was to recover the sum of $721.20, alleged to be the reasonable value of the use and occupation of premises from the 10th day of December, 1920, to the 5th day of May, 1921.

Gordon, Weed & Young (William Bierschenk, of counsel), for appellants.

Charles P. Northrop (Charles S. Clark, of counsel), for respondent.

KELBY, J. The complaint set up the ownership in the plaintiffs of the premises, and that on or about the 30th day of October, 1918, by a lease in writing then made between the plaintiffs and the defendant, the plaintiffs let to the said defendant the entire house and premises, known as No. 61 Sanford avenue, Flushing, for the term of two years then next ensuing from the 2d day of November, 1918, at the yearly rent of $1,050, payable in equal monthly payments

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of $87.50 in advance, and in and by said lease defendant agreed that at the expiration of said term he would quit and surrender the premises. It further alleged that the tenant went into possession under the said lease, and at the expiration of the term, namely, on the 2d day of November, 1920, failed to quit or surrender said premises, but continued in possession of the same, and that the premises were used for dwelling purposes.

The answer of the defendant denied any knowledge or information sufficient to form a belief as to the ownership of the plaintiffs, and denied the allegations of paragraph "seventh" of the complaint, which alleged the reasonable value of the possession, use and occupation for the period sued for to be $721.20.

For a first defense the answer alleged that this was an action for rent under an implied agreement for use and occupation of premises in a city of the first class in the state of New York, and that the rent sued for in this action is unjust and unreasonable and presumptively unjust and unreasonable pursuant to statute, and the alleged implied agreement under which it is sought to recover said rent is unjust, unreasonable and oppressive. And further that the rent sought to be recovered in this action has been increased without the consent or agreement of defendant over the rent of said premises as it existed one year prior to the time of the alleged implied agreement about seventy per cent.

For a second defense it was alleged that on or about December 10, 1920, the plaintiffs commenced an action to recover rent for use and occupation from November 2 to December 10, 1920, for the premises described in the complaint in this action. That there were in said action the same parties as in this action, and the

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issues in said action were to all intents and purposes the same as in this action, namely, what was a just and reasonable rent to be paid plaintiffs by defendant for said premises. That the defendant duly appeared and interposed as a defense in said action, under chapter 944 of the Laws of 1920, known as the Housing Laws, alleging the rent demanded by the plaintiffs was unjust and unreasonable, and demanded a trial by jury, and said action was duly brought to trial before a justice of the court and a jury on January 5, 1921, and a verdict was rendered by said jury adjudging that a fair and reasonable rent for said premises was ninety-six dollars and twenty-five cents per month, from and after the termination of the lease described in the complaint as having been made October 30, 1918. And thereafter on February 15, 1921, an amended judgment in accordance with said verdict and for costs was duly entered; and that said judgment was duly paid and satisfied. It is further alleged as part of this defense that the plaintiffs have not appealed from that judgment, nor moved that the same be vacated or modified and that their time within which to appeal has expired. And further that the judgment so rendered fixing a just and reasonable rent for said premises is a bar to the maintenance of this action by plaintiffs, and that the matters alleged in the complaint herein are by reason of said verdict and judgment *res adjudicata.*

For a third defense it was alleged that ever since the expiration of the written lease described in the complaint, plaintiffs have continuously maintained that said defendant was a trespasser upon said premises, 61 Sanford avenue, Flushing, and have maintained and asserted to defendant that there was no agreement of lease between the parties to this action and that the relation of landlord and tenant

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did not exist between them; and that in their complaint in the action commenced December 10, 1920, and in the complaint in the present action, plaintiffs elect to maintain defendant is and was a trespasser, and do not allege said premises were used and occupied by permission of plaintiffs under any agreement, or that the relation of landlord and tenant exists or existed between the parties from December 10, 1920, to May 5, 1921; and that the maintenance of such attitude and the election in such pleadings is a bar to the maintenance of this action for use and occupation.

For a fourth defense it was alleged that on or about February 19, 1921, the defendant tendered to plaintiffs the sum of $259.21, being the rent for said premises, adjudged to be fair and reasonable by said verdict and judgment, from December 10, 1920, to March 1, 1921; and that plaintiffs refused to accept said tender upon the ground that the relation of landlord and tenant did not exist between plaintiffs and defendant and they could not accept the same as rent. That the defendant has at all times been able, ready and willing to pay to plaintiffs the rent adjudged to be fair and reasonable for said premises, but plaintiffs have refused to accept the same.

Upon the defendant's demand the plaintiffs filed a bill of particulars, pursuant to the provisions of section 2 of chapter 944 of the Laws of 1920, showing the gross income derived from said premises for the year commencing December 10, 1919, and ending December 10, 1920, to be $1,062.35, and showing that there were no stores in the building, and that the whole house was occupied by the tenant. That there were fourteen rooms and four bath rooms in the house. That the property came to the plaintiffs by devise under the will of Louise R. Weed, who died Decem-

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ber 19, 1916, and that the value of the property as appraised for the purpose of payment of transfer tax in the estate of Louise R. Weed was $12,500. The assessed valuation of the property, October 1, 1919, was $14,500, and October 1, 1920, $16,500. Taxes for the year 1920, $368.30; and taxes for the year 1921, $470.25. It further showed that there were no incumbrances, and, therefore, no interest paid. The operating expenses were the taxes set forth and an insurance premium of $20.16. It was also alleged in the bill of particulars that the depreciation on the building, separate from land valued at $10,000 (value December 19, 1916, date of acquisition) at the rate of four per cent per annum, $400.

The trial justice gave judgment for the defendant and dismissed the complaint, and handed down the following memorandum decision: "The verdict of the jury in the prior action fixed the monthly rental and I believe that the bringing of his actions by the landlord for use and occupation was an election to regard the tenant as a tenant and not as a trespasser. I believe the decisions of *Rosenberg* v. *Radish,* App. Term, No. 183 (1920), and *Starpoli* v. *Delise,* App. Term, No. 300 (1920), decide that before any increase can be demanded from the tenant the record must contain something to show 'a proper legal notice to the tenant as to an increase of rent or some evidence that the tenant agreed to pay such increase,' and where such notice is not given the proceeding is irregular and void. Such notice it is conceded was not given here. I permitted the tenant to deposit all arrears so that he now has the right to set up the defense of unreasonableness. Complaint is dismissed." The result, therefore, is that the plaintiffs' complaint has been dismissed and costs of forty-five dollars have been taxed against them.

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The case of *Starpoli* v. *Delise,* cited by the trial justice, was a summary proceeding to regain possession of a store and a room behind the store and was commenced prior to the passage of the new rent laws. The petition in that case, verified March 26, 1920, alleged a monthly hiring, commencing on October 1, 1919, at twenty dollars a month, and a subsequent agreement of February 1, 1920, for rental at twenty-five dollars a month, to commence on March 1, 1920. The tenant was a tenant from month to month, and in that case this court held that no notice of any kind of an increase in rent was given and that there was a holding over under a previous agreement at the rate of twenty dollars, and that this rent could not be changed except upon due notice given to the tenant equalling in time that required by statute to terminate the tenancy.

The case of *Rosenberg* v. *Radish,* also cited by the trial justice, was an action to recover rent and was commenced before the passage of the new rent laws in April, 1920. In that case the landlord on June 11, 1918, notified the tenant that the rent for the premises then occupied by him as a lumber yard and also another parcel occupied by the tenant under the same original hiring would be increased from $60 a month to $110 a month. This court held that the notice of the increase of rent was ineffective to increase the rent commencing on the first day of July, as it was but twenty days' notice, and the statute then required a notice to terminate the tenancy of thirty days; and further that the notice while ineffective to increase the rent as of July first was effective to increase the rent from and after August first, in the event of the tenant remaining in possession after the receipt of said notice. And as authority for such holding cited

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Despard v. *Walbridge,* 15 N. Y. 374, and *Amsden* v. *Floyd,* 60 Vt. 386.

At the time of making these two decisions, as above pointed out, the new rent laws were not then in existence. The law at that time gave to the landlord an election at the end of a term to regard the tenant as a trespasser when the tenant held over or to regard him as a tenant for a renewal of the term at the same rent. Since the passage of chapter 944 of the Laws of 1920, however, this right of the landlord of election has been suspended and the tenant is permitted to remain in possession without permission of the landlord and the landlord may bring an action to recover the fair and reasonable value for the use and occupation of the premises by the tenant. *Hall Realty Co.* v. *Moos,* 115 Misc. Rep. 506; *Rogan* v. *Weiss,* Id. 193; *Weil* v. *Lesser,* Id. 241. The effect of this statute (Laws of 1920, chap. 944) has been to make the occupation of the tenant lawful, in spite of the fact that the landlord does not desire to allow the tenant to remain in possession after the termination of the term granted in an agreement. The original agreement or lease having expired the tenant holds over by force of the statute in the absence of any new agreement. And even if the tenant makes a new agreement he can attack the rent reserved as unjust and unreasonable on the first day that the rent accrues. Under these circumstances there is no necessity of the landlord notifying the tenant that after the expiration of his term use and occupation will be at an increased rate.

In the case of tenancies from month to month, or monthly tenancies, a different rule applies. Under the terms of chapter 209, Laws of 1920, amending chapter 303, Laws of 1882, as amended by chapter 357, Laws of 1889, such a tenant, in the absence of service of the notice to quit therein provided for, has

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the right to occupy the premises for another month at the same rent. This statute has not been repealed. Summary proceedings to recover real property under chapter 942, Laws of 1920, must still be predicated upon this statutory notice to quit. If, therefore, a landlord wishes to sue a monthly tenant, or a tenant from month to month, for use and occupation, or upon an implied agreement for an increased rental, he must serve the tenant with a thirty days' notice stating that he elects to terminate the tenancy. In the absence of such notice the landlord can recover from the tenant only the former monthly rent agreed upon.

While chapter 209, Laws of 1920, does not in terms provide what we have above stated, we believe that must necessarily be its meaning and effect. That statute clearly intended to prevent a tenant from being dispossessed unless he had received at least thirty days' notice of the termination of his existing agreement. If without having given such notice the landlord at the end of any month could claim that the reasonable rental value was greater than the amount theretofore paid and could sue the tenant therefor, he would, if successful, obtain a judgment against the tenant under which the latter could be dispossessed unless he paid the judgment within five days. Laws of 1920, chap. 944, § 6. In this way the landlord might dispossess his tenant without having given him any notice. This would virtually nullify the provisions of chapter 209 of the Laws of 1920. We, therefore, feel obliged to differ with the decision in *Rogan* v. *Weiss*, 115 Misc. Rep. 193.

In the instant case notwithstanding the fact that the tenant's term has expired under his lease and that he has received notice from his landlord to vacate the premises on the expiration of his term, the tenant still maintains that because now in possession over

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the term he is entitled to hold possession for another year. Clearly this is not so. The fact is that the tenant is simply in lawful possession and not a trespasser and that he is liable for use and occupation to the landlord.

The tender by the tenant of a check as rent by his letter of February nineteenth was under a claim of holding over for a new year, and the landlord, the plaintiffs in this action, properly pointed out that he refused to accept the check as rent, but that he would consider accepting it as a tender of payment for use and occupation of the premises. The defense of tender was therefore not sustained.

There remain questions of law arising under section 7, chapter 434 of the Laws of 1921, which reads as follows: "Where there has been an adjudication of the reasonable rental value of premises, such adjudication shall determine and be binding in any subsequent action between the same parties involving the rental value of the same premises for a subsequent period, unless the plaintiff or the defendant, as the case may be, plead and prove facts which shall have arisen since the period for which the prior adjudication has been made, affecting the rental value of the premises."

It is agreed that on December 10, 1920, the plaintiffs commenced an action against the defendant to recover the rental value for the use and occupation of the premises for the period between November 2, 1920, to December 10, 1920, a period of thirty-eight days. On the trial of that case the jury rendered a verdict in favor of the plaintiffs in the sum of $125.49, which was an increase over the amount of rent reserved in the pre-existing lease of about ten per cent. After the entry of this judgment the defendant paid the same, judgment was satisfied, and no appeal from the

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judgment was taken. It is further agreed that at the time of the commencement of this action the defendant had paid the plaintiffs nothing for his occupancy for the term from December 10, 1920, to May 5, 1921, except that with his answer he deposited into court $96.25, which sum was at the rate allowed by the jury's finding in the prior case.

The first question that presents itself under this section is one of pleading. The plaintiffs did not allege in their complaint any prior adjudication of the rental value of the premises as fixed by the jury in the prior case at the rate of $96.25 per month. While it is true that there is no allegation of change of conditions in the plaintiffs' complaint, the plaintiffs' statutory bill of particulars filed pointed out that the taxes for the year 1920 were $368.30, and the taxes for the year 1921, $470.25, with a resulting increase in the cost of maintaining the property of $101.95. Does this declaration in the statutory bill of particulars meet the requirement of the statute requiring the plaintiff or the defendant, as the case may be, to plead and prove facts which have arisen since the prior adjudication? The office of the ordinary bill of particulars is simply to amplify facts already alleged in the complaint. But we are dealing with a new kind of bill first created by the statute. Laws of 1920, chap. 944. The main purpose of this statutory bill was to fairly apprise the tenant of all the facts upon which the value of the premises could be predicated, and the statute in terms provided that issue should not be joined in such action until the filing of such bill of particulars. We see no reason for increasing the difficulties in pleadings in Municipal Courts. The whole intent of the various acts relating to Municipal Courts has been to make pleadings as simple as possible. The allegation, therefore, that

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the taxes for the year 1921 exceeded those of 1920 by $101.95 was a sufficient plea of the facts affecting the rental value of the premises which arose since the period as to which the prior adjudication had been made.

The judgment should be reversed and new trial ordered, with thirty dollars costs to the appellants to abide the event.

CROPSEY and LAZANSKY, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellants to abide event.

Matter of the Estate of ANTOINETTE VISMAR, Deceased.

(Surrogate's Court, New York County, December, 1921.)

Transfer tax — wills — construction of — testator's intention overcomes palpable error in describing fractional share — legacies taxable.

Where in a gift of the entire estate of testatrix in equal shares to her five sisters, naming and describing them, the bequest is by palpable error made to read "one-fourth" in place of "one-fifth," the evident intent of the testatrix must be carried out by the exclusion of "one-fourth," and since upon such construction the share of each sister exceeds $500, it is subject to a transfer tax.

APPLICATION to exempt estate from transfer tax.

Palmieri & Wechsler, for petitioner.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Tax Commission.

FOLEY, S. This is an application to exempt the estate from tax. By the 4th paragraph of her will

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decedent provided, "I give and bequeath to each of my five (5) sisters share alike," (the testatrix then names and describes each of the five sisters), "*one-fourth* (¼) of all the rest, residue and remainder of my estate and property real and personal of whatsoever name and wheresoever situated. In case of the death of any one of my sisters before my demise to their lawful children or their legal heirs to have and to hold the same absolutely and forever."

The testatrix, or more probably the draftsman of the will, made this palpable error by inserting "*one-fourth*" in place of "one-fifth." The contention of the executors, that the decedent gave one-fourth to her five sisters and died intestate as to the remaining three-fourths, must be disregarded. The language of the will prohibits this construction.

In *Kalbfleisch* v. *Kalbfleisch*, 67 N. Y. 354, the testator, who had nine children, gave certain real estate to three of them subject to the payment of a sum to the other "*eight*." The court, in construing the will, said: "It is plain that the numeral 'eight' applied to the other children of the testator in that clause is used mistakenly. It has no apparent meaning applicable to the facts of the case. As it cannot be applied, it must be entirely left out of the reading."

Likewise, in the present case the fraction "one-fourth" must be excluded from consideration and the evident intention of the testatrix carried out.

Under this construction the residuary estate passes in equal parts to the five sisters of the decedent, and since the share of each exceeds the sum of $500, the transfers are taxable and the motion to exempt is denied. The tax may be fixed, however, without the appointment of an appraiser.

Application denied.

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In the Matter of the Petition of TALLAK THORSEN to be Admitted a Citizen of the United States of America.

(Supreme Court, Kings Special Term, December, 1921.)

Naturalization — service in Coast Guard, subsequent to re-transfer from navy to treasury department, does not comply with act of Congress of July 19, 1919, permitting application without filing declaration of intention.

Where it appears that petitioner on September 22, 1921, after completing a term of exactly one year in the service of the United States Coast Guard which was by direction of the president, pursuant to the act of Congress approved June 28, 1915, transferred from the treasury department to the navy department until August 28, 1919, when it was again placed under the control and direction of the secretary of the treasury and has been ever since, the petitioner does not come within the act of Congress approved July 19, 1919, which provides that any one of foreign birth who served in the military or naval forces of the United States during the World War shall be entitled to apply for citizenship without filing a declaration of intention, etc., and such an application on his behalf will be denied.

APPLICATION for citizenship.

CALLAGHAN, J. The petitioner, claiming the benefits of the act of Congress approved July 19, 1919, has applied under the terms of that act for citizenship. He entered the United States Coast Guard service on the 23d day of September, 1920, and was honorably discharged on the 22d day of September, 1921, after completing a term of exactly one year in that service. The act of July 19, 1919, provides, in substance, that any person of foreign birth who served in the military or naval forces of the United States during the World

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War, shall, upon being honorably discharged, be entitled to apply for citizenship without filing a declaration of intention or complying with the other requirements of the Naturalization Law ordinarily required of those who have not had such service in the military or naval forces. It is the contention of the petitioner that he comes within the provisions of that act, as he urges that the coast guard is part of the naval forces of the United States. By the act of Congress, approved June 28, 1915, the present coast guard was organized. By the provisions of that act the coast guard in time of peace was to operate under the direction of the treasury department, and in time of war, at the direction of the president, it was required to operate as a part of the naval forces of the United States and subject to the orders of the secretary of the navy. By direction of the president, pursuant to the authority of the act just referred to, the coast guard service was during the period of the war transferred from the treasury department to the navy department, and continued, pursuant to such direction, until the 28th day of August, 1919, on which date the coast guard service was again placed under the control of the secretary of the treasury and has remained under his direction up to the present time. This petitioner cannot, therefore, claim the benefits of the act of July 19, 1919, unless it be held that the treasury department is a part of the military or naval forces of the United States. Of course it is not and never has been. While it appears from the record that this petitioner was induced to join the coast guard by a circular issued by the coast guard service, to the effect that he might claim the benefits of the act of July 19, 1919, after service and honorable discharge in the coast guard, yet that circumstance does not justify the court in doing violence to the plain provisions of the act of

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July 19, 1919, by admitting those who do not come clearly within the provisions of that act. This application must, therefore, be denied.

Application denied.

RICHARD CROKER, JR., Individually and as Trustee, etc., Plaintiff, *v.* RICHARD CROKER et al., Defendants.

(Supreme Court, New York Special Term, December, 1921.)

Trusts — when parents create a trust with power of revocation to be executed by both, survivor cannot terminate the trust — when increase of corpus from income not an unlawful accumulation under Personal Property Law, § 16 — gift of income to children held to continue during father's pleasure only — father entitled to income since date he directed payment to him.

A trust agreement executed by the parents of the plaintiff, who at the time were living apart, provided that the survivor should receive the entire income of the trust fund, a considerable part of which belonged to the mother, and at his or her death the principal and all accumulations of income should be paid over in equal shares to their children, other than plaintiff, who for himself and his heirs waived all right of participation in the trust fund. The trust agreement contained the following: "It is expressly agreed and made part of this instrument that the terms and conditions hereof and of the trusts and estates herein created or any of them may from time to time be revoked, modified or changed in any particular, by instrument in writing, duly signed and acknowledged by the parties of the first part and delivered to the party of the second part or his successors in trust." In an action for the settlement of the accounts of the trustees and for instructions as to his future administration of the trust, *held*, that the father had no right to revoke the trust agreement after the decease of his wife, as to hold otherwise would defeat one of the most important purposes of the trust, to wit, the creation of remainders in the children of the trustors, and would be subversive of the intent expressed in the revocation clause of the trust agreement.

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Under the trust agreement the mother during her lifetime was entitled to and did receive the income of the trust fund up to $5,000 a year and the balance belonged to the father, who, as satisfactorily shown by the evidence, orally instructed plaintiff to add his share of the income to the corpus of the trust, his express desire being to increase the fund for the benefit of his children. Plaintiff acting upon such instructions paid over to the other defendants their designated shares of the income for a long period until May 21, 1920, and his course was approved by his father from time to time. *Held*, that such disposition of the income was proper; that the father had a right to increase the corpus of the trust and whether it was done from his share of income or from other sources was immaterial, and his contention that such direction would be void and in violation of section 16 of the Personal Property Law, which refers solely to direction for accumulation of income contained in an instrument in writing, was untenable, as that statute did not apply here.

Where the evidence showed that one of plaintiff's sisters by the express direction of her father was excluded from participation in the income during a certain period, the plaintiff trustee will not be personally surcharged with the amount she claims as her share of the income.

It clearly appearing that the father's gift of the income to his children was a voluntary act, to continue only during his pleasure, the whole income from the trust fund since the date upon which he directed it to be paid to him belongs to him, except the amount directed to be paid to one of the daughters.

JUDICIAL settlement of accounts of trustee.

McCombs & Ryan (Frederick C. Ryan and Max D. Steuer, of counsel), for plaintiff.

Leventritt, Cook, Nathan & Lehman (Harold Nathan, of counsel), for defendant Richard Croker.

Maurice Steiner and Edward M. Salley, for defendant Florence C. Morris.

Gannon, Seibert & Riggs (R. E. T. Riggs, of counsel), for defendant Howard Croker.

Moses Miller, for defendant Ethel C. White.

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DAVIS, J. This action is brought by plaintiff, as trustee under a certain trust agreement, for a judicial settlement of his accounts as trustee and for advice and instructions as to his future administration of trust. Plaintiff is a trustee under an instrument executed April 20, 1909, by Elizabeth Croker and Richard Croker, Sr., the parents of the plaintiff. The defendants are Richard Croker, Sr., father of plaintiff; Ethel C. White and Florence C. Morris, plaintiff's sisters; Howard Croker, brother of plaintiff, and Ethel C. White, an executrix under the will of her mother, Elizabeth Croker, deceased. Under this agreement Elizabeth Croker and Richard Croker, Sr., sold, assigned and transferred to the plaintiff certain property consisting of mortgages amounting to $98,000 and $20,359.26 in money in trust, to collect the income and to invest and reinvest and to pay the net income in equal shares to Elizabeth Croker and Richard Croker, Sr. In the event that one-half of the income should not amount to $5,000 the trustee is directed to pay to Elizabeth Croker an additional sum sufficient to make $5,000 per annum, and to pay the balance of income over $5,000 to Richard Croker, Sr. The trust agreement further provides that upon the death of either Elizabeth Croker or Richard Croker, Sr., the survivor shall receive the entire net income, and upon the death of the survivor the principal and all accumulations of income shall be paid over in equal shares to the children then living of Elizabeth Croker and Richard Croker, Sr., other than the plaintiff, who waived for himself and his heirs all right of participation in the trust fund. Plaintiff accepted the trust and has continued to discharge the duties incident thereto without compensation. The nature and extent of the account to be rendered by the plaintiff will depend largely upon the effect of the following provision of the trust

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agreement: "It is expressly agreed and made part of this instrument that the terms and conditions hereof and of the trusts and estates herein created or any of them may from time to time be revoked, modified or changed in any particular, by instrument in writing, duly signed and acknowledged by the parties of the first part and delivered to the party of the second part or his successors in the trust." It is claimed by the defendant Richard Croker that he revoked the trust agreement of April 20, 1909, by an instrument in writing according to the terms of the trust agreement. The plaintiff Croker claims that his father had no power to revoke the trust after the death of Mrs. Croker. Thus, as a counterclaim, the defendant Richard Croker, Sr., alleges that the bonds and mortgages described in the trust agreement were the proceeds of funds belonging to him and that the money mentioned therein was also owned by him and were assigned and paid over to the plaintiff without any valuable consideration in trust for the purposes set forth in the trust agreement; that Elizabeth Croker died on the 6th day of September, 1914; that thereafter and on or about August 2, 1917, defendant Croker executed and caused to be delivered to the plaintiff an instrument in writing, duly acknowledged on said date, revoking the said trust agreement of April 20, 1909, and all the trusts and estates created thereby and directing and requiring plaintiff to convey and return to defendant Croker all of the original trust fund and its proceeds. The instrument of August 2, 1917, is duly acknowledged, and, after recitals referring to the deed of trust, proceeds as follows: "Now, therefore, I, the said Richard Croker, do hereby revoke the said instrument hereinbefore referred to and all of the trusts and estates created therein. I further direct and require the said Richard Croker, Jr., that he shall immediately

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upon receipt of notice of this revocation, convey and return to me all of the original trust fund, cash, notes, bonds, mortgages and other securities and all investments or reinvestments of the same, or of the income or proceeds thereof, together with all of the income derived from said trust funds or of the investment or reinvestment thereof, not heretofore legally disbursed by the said Richard Croker, Jr." (Ex. 6). None of the other parties to this action acquiesced in this attempted revocation. The question to be determined at the outset is whether the defendant Richard Croker, Mrs. Croker being then dead, had power under the terms of the trust agreement of April 20, 1909, to revoke the trust thereby created. The plaintiff contends that the power to revoke the trust did not survive the death of Mrs. Croker and that by the terms of the trust agreement revocation could be effected only by the joint act of Mr. and Mrs. Croker. On the other hand, the defendant Richard Croker, Sr., claims that the trust agreement reserved to the grantors the power of revocation, as permitted by section 144 of the Real Property Law, and that the execution of the power of revocation is therefore governed by section 166 of the same law. Section 144 provides that "the grantor in a conveyance may reserve to himself any power beneficial or in trust which he might lawfully grant to another; and a power thus reserved shall be subject to the provisions of this article, in the same manner as if granted to another." Section 166, Real Property Law, is as follows: "Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors." In my opinion, the purpose of section 166 is to prevent the failure of a trust through the death of one or more of the donees of the

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power in trust. It aims to preserve the trust. The defendant Richard Croker invokes the aid of this provision to destroy the trust, not to uphold it. For this reason I think it has no application to this case. Moreover, this section (166) is written in most general terms and would not be controlling where the intention of the trustors that the right of revocation should be exercised by both jointly and not by the survivor is so clearly expressed as here. At the date of the execution of the trust agreement in question Mr. and Mrs. Croker were living apart. It is satisfactorily established by the evidence that a considerable part of the property constituting the trust fund had belonged to Mrs. Croker and that it was the purpose of both Mr. and Mrs. Croker to provide through the medium of the trust agreement an income for Mrs. Croker during her life, and upon the death of both to cause the trust fund to go to their children, except the plaintiff. Thus the agreement provides that upon the death of either Mrs. Croker or Richard Croker, Sr., the net income should be paid to the survivor for life, and upon the death of the survivor the trustee is required to pay over the entire principal, with all accumulations of income thereof, to the children of Mr. and Mrs. Croker who may then be living, in equal portions, other than the plaintiff. By the same instrument plaintiff waived all right to a share in the trust fund as well as all commissions. We may assume from the evidence that the trustors were not on such terms as would lead either to give the other the right to revoke the trust in favor of their children in the event of the death of either. This assumption is supported by the language of the revocation clause. The revocation must be "by instrument in writing duly signed and acknowledged by the parties of the first part * * *." To hold that either party to the trust agreement could revoke the

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trust upon the death of the other would defeat one of the important purposes of the trust, to wit, the creation of remainders in the children of Mr. and Mrs. Croker, and would be subversive of the intent expressed in the revocation clause. It is therefore my view that the defendant Richard Croker had no right of revocation of the trust agreement after the decease of Mrs. Croker. The revocation to be effective had to be the joint act of Mr. and Mrs. Croker. There remains the question as to whether plaintiff has properly disposed of the income of the trust fund. During Mrs. Croker's lifetime she was entitled to receive and did receive the income of the fund up to $5,000 a year, and the balance belonged to Mr. Croker. It is satisfactorily shown by the evidence that Mr. Croker instructed the plaintiff to add his share of the income to the *corpus* of the trust fund, his expressed desire being to increase the fund for the benefit of his children, and it was so disposed of by plaintiff. The defendant Richard Croker contends that such a direction would be void and in violation of section 16 of the Personal Property Law. I think section 16 has no application to the present case. It refers solely to directions for accumulations of income contained in an instrument in writing. In my opinion the question of unlawful accumulation of income under section 16, Personal Property Law, is not involved in this case. Here the instructions were oral and they disposed of personal property belonging to defendant Croker, which he saw fit to use to increase the trust fund for the benefit of his children. He had a perfect right to increase the *corpus* of the trust fund, and whether it were done from his share of income or from his property derived from other sources is immaterial. *Central Trust Co.* v. *Falck,* 177 App. Div. 501, 509. The plaintiff acted upon the instructions of defendant

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Richard Croker and paid over to the other defendants their designated shares of the income for a long period until May 21, 1920, and the evidence shows that the defendant Richard Croker, from time to time, approved of plaintiff's course. The defendant Florence C. Morris by her answer seeks to surcharge the plaintiff personally with $2,133.33, which she claims as her share (one-third) of the total income at the rate of $5,000 a year from December 20, 1914, to July 1, 1916. I think Mrs. Morris must fail in this contention, as the evidence shows that she was excluded from participation during this period by the express directions of her father. Later in June, 1916, the defendant Richard Croker directed the plaintiff to make an equal distribution of the $5,000 of income among his three children. This direction was given in a letter received by plaintiff from his father in June, 1916. Plaintiff was unable to find the letter in question and was allowed to state its contents from his recollection, and his testimony on this point was corroborated to some extent by exhibit 9, signed by defendant Richard Croker December 11, 1916, and in which he confirms his former verbal direction and states that the income is thereafter to be divided equally among his three children, Florence, Ethel and Howard. Pursuant to these directions of his father the plaintiff made equal distributions of the income up to $5,000 among the three children named, making the first payment to his sister Florence on July 1, 1916. And he continued to make these payments until the latter part of December, 1919. Thereafter he ceased making payments out of income to anybody because he received written directions from his father, dated May 21, 1920, to pay the entire income of the trust fund to him, except $1,667 thereof which the latter directed plaintiff to pay each year to his daughter Florence C. Morris. It is my

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opinion that the trustee has properly disbursed the income from the trust fund. And in adding the excess of income over $5,000 to the principal the plaintiff acted under authority of the owner of the excess. The latter cannot now, after many years of acquiescence in that course and after the income derived from the principal so increased has been paid over to beneficiaries designated by the owner of the excess, disavow plaintiff's action and charge him personally with the payments so made, and with the additions to the principal fund of the trust. The payments of interest were properly made and the additions to the principal cannot now be taken therefrom. The principal of the trust fund has been augmented by contributions to it by defendant Richard Croker of his share of the income. At his direction the plaintiff paid the $5,000 of income from the fund so increased to the three children, but ceased to make payments by order of his father on May 21, 1920, and he asks for instructions as to his future administration of the trust. Shall he continue to dipose of the income as formerly and at the death of Richard Croker, Sr., pay over the principal to the three children, or must he obey the direction of Mr. Croker and henceforth pay all the income to him during his life, and thereafter distribute the principal of the trust among the three children? The plaintiff and defendants Ethel C. White and Howard Croker claim that in June, 1916, the defendant Richard Croker made an agreement with the plaintiff and defendants Mrs. White and Howard Croker by the terms of which the plaintiff during the lifetime of Mr. Croker should pay over to his children Ethel, Florence and Howard, share and share alike, all of the income of the said trust estate to the extent of $5,000 annually. The alleged agreement, it is claimed, further provided that all sums over $5,000 should be added to the principal of said trust estate and made

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part thereof, and it is alleged in the answers of these defendants, Howard Croker and Mrs. White, that between July 1, 1916, and the 31st of August, 1919, payments were made to the three children pursuant to this agreement. In none of the pleadings is any consideration alleged for the making of the agreement as pleaded, nor do I find in the testimony sufficient evidence upon which to base a finding that such an agreement was ever made. On the contrary, it seems clear to me that Mr. Croker made a gift of this income to his children as a voluntary act, to continue not necessarily during his lifetime, but during his pleasure. It therefore follows that the whole income from the trust fund since the date upon which he directed it to be paid to him belongs to defendant Richard Croker, except the amount directed by him to be paid to his daughter Florence. Findings of fact and conclusions of law as proposed have been passed upon. Other findings should be proposed in accordance with the views expressed in this opinion.

Ordered accordingly.

FARMERS NATIONAL BANK OF UNION, Plaintiff, *v.* CLARENCE M. WILLIAMS and CASSIE M. WILLIAMS, Defendants.

(Supreme Court, Broome County, December, 1921.)

Motions and orders — summary judgment — promissory note — transferee not holder in due course without indorsement by payee — motion for summary judgment denied where complaint and affidavit failed to state the full facts — Rules of Civil Practice, rule 113 — Negotiable Instruments Law, § 79.

Under section 79 of the Negotiable Instruments Law the transferee of commercial paper cannot be a holder thereof in due course until it has been indorsed by the payee.

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The complaint in an action against the makers of a promissory note did not allege who was the payee of the note or that it was transferred by his indorsement, nor was it alleged that plaintiff took the note in good faith and for value, or that at the time it was negotiated, plaintiff had no notice of any infirmity in the paper or defect in the title of the one negotiating it. The answer, following a denial of certain material allegations of the complaint, alleged that plaintiff, at the request of one D. and for value received, discounted the note in the usual course of business and thereupon became and still was the owner and holder thereof. *Held*, that though upon a motion for summary judgment under rule 113 of the Rules of Civil Practice the plaintiff submitted an affidavit stating that the note, prior to maturity, was taken and received in the ordinary and usual course of business and that plaintiff was the owner and holder thereof in due course, the motion will be denied where the defendants also file an affidavit stating facts sufficient to entitle them to defend the action, and neither the note nor a copy thereof is presented on the motion.

APPLICATION for summary judgment.

Thomas A. MacClary, for motion.

Williams & Smith, opposed.

TUTHILL, J. The plaintiff applies for summary judgment under rule 113 of the Rules of Civil Practice. The action is brought against the makers of a promissory note. The defendants have interposed an answer in and by which they deny certain material allegations of the complaint, that on or about the 25th day of May, 1921, the plaintiff, at the request of Lee Dubois, and for value received discounted the note in the usual course of its business and thereupon became and still is the owner and holder thereof. An affidavit is also filed in behalf of defendants in and by which alleged statements are made which the defendants contend show facts sufficient to entitle them to defend the action.

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Securing judgment under the new rule is a marked departure from the practice which has heretofore obtained in this state. It is drastic, and while it may be a proper procedure in certain cases, I do not believe in this instance a summary judgment should be rendered, and that defendants are entitled to a trial in the usual form of a plenary action.

While the complaint may be entirely sufficient for a recovery by the plaintiff as a holder in due course under section 91 of the Negotiable Instruments Law, yet it nowhere appears in the complaint, or in the affidavit filed in behalf of plaintiff for judgment, who was the payee of the note or that it was transferred by indorsement, nor is it stated that the plaintiff took the note in good faith and for value or that at the time it was negotiated the plaintiff had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Where an instrument is transferred without the indorsement of the payee, a transferee cannot be a holder in due course until the indorsement is placed on the instrument. Neg. Inst. Law, § 79. Neither the note nor a copy is presented to the court on this application. The affidavit submitted does state, in the 6th folio: "That the said promissory note was taken and received by the plaintiff in the ordinary and usual course of its business prior to maturity and the plaintiff is the owner and holder of said note in due course." This, as already stated, may be sufficient for a pleading, but in an affidavit for a summary judgment where a defense has been interposed of the nature here pleaded, I believe further facts should affirmatively appear giving the name of the payee, whether the note was indorsed and discounted in good faith, the time of discounting, the value paid therefor and that it was received by the present alleged owner and holder thereof without

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notice of any infirmity in the instrument or defect in the title of the person negotiating it. In other words, a full and complete disclosure by the plaintiff of all facts should be presented to the court, showing the plaintiff's ownership and title to the note and negativing the defense interposed.

The question is not whether an alleged cause of action is set forth in the complaint and in the affidavit submitted, but whether the defendants have not shown facts overcoming those claimed by plaintiff which the judge hearing the motion deems sufficient to entitle them to defend.

Taking all the facts and circumstances into consideration as shown by the affidavits, and the deficiencies of the affidavit presented in plaintiff's behalf, I believe the defendants are entitled to defend this action.

The motion is denied, with ten dollars costs.

NATHAN MORGENROTH, as Executor of the Estate of JACOB MORGENROTH, Deceased, Landlord, *v.* HARRIS EMERT, Tenant.

(Municipal Court of the City of New York, Borough of Manhattan, Sixth District, December, 1921.)

Landlord and tenant — cities of the first class — "Housing Laws" — summary proceedings — when tenant may remain upon payment of reasonable rent — tenant cannot be dispossessed from apartment, a portion of which is used for business, unless the business becomes objectionable or premises are not used for dwelling purposes — Laws of 1920, chap. 942.

The recent "Housing Laws" created a new form of tenancy under which a tenant, without the permission of the landlord, is entitled to remain in possession of the premises occupied by him on October 1, 1920, upon payment of a reasonable rent,

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and neither expressly nor by necessary implication does the statute (Laws of 1920, chap. 942) permit the court to regulate or fix the extent of the occupancy or possession to which the tenant on that date was entitled, or to sever a room used for business purposes under the original hiring from the remainder of the premises occupied for dwelling purposes.

A tenant, therefore, who for many years prior to October 1, 1920, occupied only a part of the leased premises for dwelling purposes, may not be dispossessed under chapter 942 of the Laws of 1920, unless the business conducted by him in the other part of the premises becomes objectionable or the case, by proof, is brought within one or more of the exceptions provided for in said statute.

PROCEEDING to dispossess tenant.

Cohen, Cole & Weiss (David Barr, of counsel), for landlord.

Irving G. Warshaw, for tenant.

MARKS, J. The tenant in this proceeding many years ago rented and has since occupied with his family the premises described in the petition as "the north store of the premises No. 1579 Madison avenue" as a monthly tenant.

He has always conducted and now conducts in the store the business of framing pictures and making window shades. There is an entrance with a door leading from the store to four rooms in the rear of it which are adapted and used for dwelling purposes by the tenant and his family. The store has an entrance from the street, and the four rooms also have a door leading into a hallway which is independent of the store, so that they may be entered without passing through the store.

The landlord claims that the inhibition of chapter 942 of the Laws of 1920, that no summary proceeding "shall be maintainable to recover possession of real property * * * occupied for dwelling purposes,"

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except in certain contingencies, does not apply, as the premises are used for business and not occupied solely for dwelling purposes. This proceeding was brought to dispossess the tenant from the entire premises, as they are claimed to have been hired, to wit, "the north store of the premises No. 1579 Madison avenue," but the landlord has abandoned his claim that the tenant may be dispossessed from the entire premises, but claims that, as the four rooms may be separated from the store without inconveniencing the tenant in the possession or occupancy of those rooms for dwelling purposes, the tenant may be dispossessed from the store.

The reasons for the enactment of the group of "Housing Laws," of which chapter 942 is one, are now too well known to require a restatement of them. The provisions of the act, being emergency legislation, must be liberally construed to carry out the intent thereof, as provided by chapter 948 of the Laws of 1920, but it would result in chapter 942 receiving an illiberal construction if the claim of the landlord herein should be sustained. His counsel cites the case of *Sexauer* v. *Burke*, 228 N. Y. 341–345, holding that "freedom to construe is not freedom to amend." Yet he would read into the act the word solely or exclusively, claiming that as the premises are not solely or exclusively occupied for dwelling purposes and a separation of the rooms without injury to the rights of the tenant can be made by closing the door leading from the store into the dwelling rooms, the tenant may be dispossessed from the store used for business purposes. The permanent closing of this door, however, would result in the dwelling rooms being deprived of light and ventilation, which they receive when the door is open, but regardless of that fact my opinion is that the rooms cannot be separated.

The words "dwelling purposes" are not capable of

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a fixed definition which will be always applicable regardless of the context in which they are used. *May* v. *Dermott,* 114 Misc. Rep. 106–108.

The legislative intent to protect tenants of premises " occupied for dwelling purposes " cannot be given its proper force and effect unless we include within the protection afforded by the act premises rented and occupied by the tenant for both dwelling and business purposes, and the words should be given a definition that will conform to the legislative intent.

Having in mind the conditions existing when the act became a law and that were intended to be prevented or remedied, the strict technical or exclusive meaning of those words should not obtain, in the absence of any words or purpose clearly denoting an intention that they should be strictly construed.

There is nothing in the act in express words or that may be implied therefrom or from the remedial protection intended to be given to tenants in possession on October 1, 1920, that justifies a construction so that there may be read into the act either of the words solely or exclusively or that would justify the court in removing a tenant from premises of which he was in possession on October 1, 1920, upon the theory that they are not solely occupied for dwelling purposes, when the facts show that the major portion or even part of them have been and are in good faith used for such purposes.

When the act took effect there were thousands of suites of apartments in this city rented with the privilege of carrying on some slight business or profession in one of the rooms, usually the front room, but such a tenant, because he occupies only part of the premises for dwelling purposes, cannot be dispossessed under chapter 942 unless the business becomes objectionable. Nor can he be dispossessed if, having rented

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a private dwelling or a suite of rooms in an apartment house for dwelling purposes, he sublet one or more of the rooms for profit while continuing to occupy the remaining rooms for dwelling purposes. *Jackson* v. *Grey*, 114 Misc. Rep. 92; *Howie* v. *McKenzie*, Id. 117; *May* v. *Dermott, supra*. Such a subletting is merely incidental to the occupancy by the tenant of the entire premises for dwelling purposes. *May* v. *Dermott, supra*.

The same rule or construction of a tenant's hiring and occupancy should prevail where the premises are a store with rooms in the rear of it hired and occupied by the tenant for both dwelling and business purposes. His use of the store for business is also merely incidental to the occupancy of the entire premises for dwelling purposes.

Hired, used and occupied as these premises have been, it cannot be presumed that the original hiring and the continued occupation were primarily for business, but to entitle the landord to dispossess the tenant under chapter 942 he must establish that the business has become objectionable or that the premises are not occupied for dwelling purposes.

The new rent laws created a new form of tenancy under which the tenant is permitted to continue in possession, without the permission of the landlord, of the premises occupied by him on October 1, 1920, upon paying a reasonable rental. *Hall Realty Co.* v. *Moos*, 115 Misc. Rep. 506. The right to the continued possession of the premises occupied by the tenant on that date and used by him for dwelling purposes is recognized by the statute, and there is nothing to indicate that the legislature intended to create a still further form of new tenancy by dividing the original hiring of the premises, as the occupancy existed when the statute became a law, and dispossessing the tenant from

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that part used for business or profit and permitting him to retain only that part used exclusively for dwelling purposes. There is nothing in the act either express or by implication that would permit the court to regulate or fix the extent of the occupancy or possession to which the tenant was entitled on October 1, 1920, or that permits the court to sever a room used for business purposes by consent under the original hiring from the remainder of the premises occupied for dwelling purposes. The tenant is entitled to remain in possession of all the premises he rented when used partly for a dwelling or subject to be dispossessed from them entirely if facts are established bringing the case within one or more of the exceptions provided for in chapter 942.

If the premises are worth more rental than the tenant now pays, $60 per month, the landlord having demanded $110, the landlord has his remedy under the statute to apply to the court to fix the reasonable rental value.

The proceeding is dismissed on the merits.

Proceeding dismissed.

SCHWARTZ & WEISNER HOLDING CORPORATION, Respondent, *v.* CHARLES H. FERNALD et al., Appellants.

(Supreme Court, Appellate Term, First Department, November, 1921, Term — Filed January, 1922.)

Municipal Court of the city of New York — practice — landlord and tenant — increase of rent — where after a trial before a justice without a jury the judgment is set aside, the parties are restored to their status as of time of joinder of issue — refusal of jury trial upon second trial reversible error — Municipal Court Code, § 118.

In an action brought to secure an increase in rent the respective defendants, upon pleading, duly demanded a jury

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trial pursuant to section 118 of the Municipal Court Code. The cause, after being placed upon the general calendar as required by section 95 of said Code, was submitted to one of the justices, who made a decision increasing the rent of several of the defendants fifteen per cent. The judgments entered upon such decision were set aside on motion, upon the ground that defendants' attorney had exceeded his authority in waiving a trial by jury, and the justice, upon conditions not pertinent here, permitted the submission to be withdrawn and remanded the case to the general calendar. *Held,* that by such decision the parties were restored to their original status as of the time of the joinder of issue.

The cases coming on for trial before another justice, he stated that he would not allow a jury trial and the defendants, having taken an exception to such ruling, declined to proceed without a jury and inquests were taken whereby the rentals of defendants were increased on an average of forty per cent. *Held,* that the situation as presented to the second justice was as if no other trial had been had; the decision of the court that a jury trial could not be had was erroneous, and an order entered upon denying defendants' motion to open the defaults and to vacate the judgments entered thereon will be reversed, the motion granted, the judgments vacated and new trials ordered.

APPEAL by defendants from an order denying their motion to open a default and to vacate judgments entered thereon.

L. M. Hutchins (Walter Henry Wood, of counsel), for appellants.

H. I. & L. Cohen (Albert De Roode, of counsel), for respondent.

DELEHANTY, J. I assume, because it is fairly inferable from the papers presented, that at the time of pleading herein defendants duly demanded a jury trial pursuant to section 118 of the Municipal Court Code and that thereupon the cause was placed upon the general calendar of that court, as required by

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section 95 of said Code. That thereafter by consent of counsel the cause, which was instituted to secure an increase in rents from the respective defendants, tenants, was submitted to one of the justices for decision. Thereafter the justice made a decision increasing the rent of the several defendants fifteen per cent. Upon learning this a motion was made by defendants to set aside the judgments entered upon said decision on the ground that their attorney had exceeded his authority in waiving a trial by jury. The result of that motion was that the trial justice permitted a withdrawal of the submission upon certain conditions, not pertinent to the determination of this appeal, and remanded the case to the general calendar. This calendar, as provided by the Municipal Court Code, is made up of both jury and non-jury causes. By that decision, it seems to me, the parties were restored to their original status as of the time of joinder of issue. In due course of time the cases came on for trial before another justice and all parties appearing and announcing their readiness for trial the justice stated that he would not allow a jury trial and, defendants duly excepting thereto and declining to proceed without a jury, inquests were taken whereby the rentals of defendants were increased on an average of forty per cent. Thereafter a motion was made to open said defaults which was denied and from the order entered thereon this appeal is taken. We are not interested in the real motive of defendants which led up to their application to set aside the submission of the controversy to the first justice and may well assume that if the decision of the court in the first instance had been favorable to the defendants, that they would have been content therewith and not raised the point now urged that there has been an invasion of their constitutional right to a trial by

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jury. However, we believe that the situation as presented to the second justice was as if no other trial had been had and defendants having at the time of joinder of issue demanded and deposited the fee for a jury trial that the trial justice should have accorded them the right thereto. The facts fail to show, as contended by plaintiff, that there was any general waiver by defendants of a jury trial nor was there an abandonment of the causes by virtue of the refusal to proceed to trial when the court erroneously decided that a jury trial could not be had. That ruling having been duly excepted to the rights of defendants were protected thereby and they were justified in adopting the course then pursued. The situation presented cannot be magnified into anything more than an ordinary default from which defendants should be relieved. The order appealed from should be reversed. Motion granted, judgment vacated and new trial ordered, with ten dollars costs to appellant to abide the event.

LEHMAN and WHITAKER, JJ., concur.

Motion granted, judgment vacated and new trial ordered, with ten dollars costs to appellant to abide event.

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BROENIMAN COMPANY, INC., Respondent, v. LIBERTY EXPORT & IMPORT CORPORATION, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1921, Term — Filed January, 1922.)

Evidence — sales — contracts — jurisdiction — damages for breach of guaranty of condensed milk — survey report filed with clerk of court in Belgium held not prima facie evidence of contents — not duly authenticated according to Code of Civil Procedure, § 957 — nothing to show that foreign court acquired jurisdiction of defendant.

Defendant by its contract of sale and delivery to plaintiff for shipment to Belgium of three hundred cases of condensed milk guaranteed it for a period of six months from the date of shipment against "swells, coagulations, etc." Upon the trial of an action to recover damages for breach of the guaranty, defendant gave no evidence and the only question submitted to the jury was the amount of plaintiff's damages. A survey report filed with the clerk of the Court of Commerce of Brussels, in a case brought by plaintiff's principals against the defendant herein, and duly certified over the seal of the American consul at Brussels, sufficiently identified milk as that covered by the complaint herein, and in said report it was stated that certain of the cans had bulged, that the milk therein had fermented and was unsuitable for human consumption, and the loss was estimated at two-thirds of the full shipment. The trial court upon proof as to the law of Belgium held that the survey report, a copy of which, before the commencement of the present action, was sent to defendant in response to its request in a letter to plaintiff's principals, to supply defendant "with a full and complete affidavit signed by the American consul in Brussels before we can obtain the necessary action in connection with the manufacturers," was *prima facie* evidence of its contents. *Held,* error. Upon reversing a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, *held,* that aside from the points of lack of due authentication of the survey report in accordance with section 957 of the Code of Civil Procedure, and as to the proper custodian of such document, the objection that there

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being nothing to show that the Belgium court acquired jurisdiction of the defendant the court on appeal was not warranted in considering the statements in the survey as evidence against the defendant, was well taken.

APPEAL by defendant from judgment of City Court of the city of New York in favor of plaintiff and from order denying defendant's motion for new trial.

Hardy, Stancliffe & Whitaker (Noah A. Stancliffe and John L. Farrell, of counsel), for appellant.

Leon Dashew, for respondent.

GUY, J. Defendant sold and delivered to plaintiff for shipment to Belgium 300 cases of condensed milk guaranteed for a period of six months from date of shipment against "swells, coagulations, etc." In the original contract defendant agreed to furnish the "Thrift" brand, but by reason of the fact as represented that defendant could not procure this particular brand, "Freedom" brand was substituted with plaintiff's consent.

Defendant gave no evidence on the trial, and the only question submitted to the jury by the court was the amount of plaintiff's damage.

Plaintiff claimed on the trial to have proven defendant's breach of the guarantee by a survey report filed with the clerk of the Court of Commerce of Brussels on June 28, 1920, "in the case Delhaize Freres & Cie of Brussels [plaintiff's principals] versus Liberty Export Company, Woolworth Building, New York;" the survey being certified over the seal of the American consul at Brussels. In the survey the milk is sufficiently identified as that covered by the complaint in this action, and it is stated therein that certain of the cans had bulged and that the milk therein had fermented and was unsuitable for human consumption,

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and the loss was estimated at two-thirds of the 300 cases furnished.

The court held under proof given at the trial as to the Belgium law that the report was *prima facie* evidence of its contents.

Before suit was brought a copy of the survey was sent to defendant in response to a request in its letter to plaintiff's principals, dated May 14, 1920, to supply defendant "with a full and complete affidavit signed by the American consul in Brussels before we can obtain the necessary action in connection with the manufacturers."

Appellant contends that the papers making up the survey were not properly authenticated in accordance with section 957 of the Code; that there is no proof that under the law of Belgium the secretary of the Belgium court was charged with the duty of keeping documents of the character of the survey and no proof that under that law the paper was entitled to any degree of credence; that the report was not proof of the contents thereof; and that there is nothing in the record to show whether the survey was a judgment or only the equivalent of a deposition, or merely a report.

Aside from the points of lack of due authentication of the report and as to the proper custodian of such document it seems to me that the objection that there is nothing before us which warrants us in considering the statements of the survey as evidence against the defendant is well taken, because there is nothing to show that the Belgian court acquired jurisdiction of the defendant. *Geduld* v. *B. & O. R. R. Co.*, 55 Misc. Rep. 239; *Shepard* v. *Wright*, 59 How. Pr. 512; *Eytinge* v. *Atlantic Transport Co.*, 160 App. Div. 635. It is true that it is stated in the document that the person appointed by the Belgian court to make

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the survey called on the American consul at Brussels, who declared that "a survey is carried out by an expert and the survey report is submitted to the consul for his approval if any. This document called an affidavit is conclusive before the American courts of law." But the respondent has not called our attention to any provision of law which justified the statement reported to have been made by the American consul.

It follows that the judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

GAVEGAN and MULLAN, JJ., concur.

Judgment reversed and new trial ordered with costs to appellant to abide event.

MORRIS ORINSTEIN, Appellant, *v.* SAMUEL A. JAFFEE, Doing Business under the Firm Name and Style of JAFFEE & Co., Respondent.

(Supreme Court, Appellate Term, First Department, December, 1921, Term — Filed January, 1922.)

Motions and orders — setting aside verdict — where there is sufficient evidence to justify verdict, setting aside improper — sale according to sample — change in order for goods.

Where a verdict is clearly the result of passion, prejudice or corruption, the discretionary power of the court to set it aside is not intended to establish the proposition that a verdict shall not be permitted to stand unless it is in harmony with the views of the trial justice.

Where, though the testimony on material points is conflicting, there is sufficient evidence to justify the finding of the jury, the granting of a motion to set aside the verdict is an improper exercise of judicial discretion.

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In an action to recover the purchase price of calicos alleged to have been sold in accordance with samples, one containing red lines, another blue lines and the other dark blue or black lines, the defendant contended that the contract was for goods containing red and blue lines and dark blue lines, and that contrary to the agreement the plaintiff furnished calicos with black lines, for which reason the goods were rejected. *Held*, that an order setting aside a verdict in favor of plaintiff on the ground that his testimony with respect to the change made in the order for the goods was not only false but a deliberate attempt to insert therein certain words to justify the delivery of goods not called for by the defendant, will be reversed with costs to appellant and the verdict reinstated.

APPEAL by plaintiff from order of City Court of the city of New York setting aside a verdict in favor of plaintiff and ordering a new trial.

Kaufman & Wolf (George Wolf, of counsel), for appellant.

Morris & Samuel Meyers, for respondent.

GUY, J. Plaintiff sued for goods sold and delivered, and the jury gave him a verdict, which has been set aside by the trial court.

The goods were calicos, sold in accordance with three samples, one containing red lines, another blue lines, and the other dark blue or black lines. Defendant contended that the contract was for goods containing red and blue and dark blue lines, and that contrary to the agreement the plaintiff furnished calicos with black lines, for which reason the goods were rejected.

It appears that the order was given by defendant's salesman Kaplan; that in connection with the order he called on two successive days at plaintiff's store, on the first occasion taking away three samples showing red, light blue and dark blue lines; that on the

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following day he told the plaintiff he would take the goods and presented a written order to plaintiff. When the order was presented it provided only for red and blue lines, and the plaintiff testified that he accordingly called Kaplan's attention to the fact that he had taken three samples, and that he should mark on the order dark blue or black, " whatever the color contained;" that defendant's salesman thereupon called up defendant on the telephone, and after conversation with defendant put down dark blue or black on the order. Defendant's salesman conceded that he changed the order by putting down dark blue, but insisted he never wrote " & blk " thereon.

The verdict in favor of plaintiff was set aside by the trial judge on the ground that the plaintiff's testimony with respect to the change made in the order was not only false but a deliberate attempt to insert in the order certain words to justify the delivery of the goods not called for by the defendant.

It is true that plaintiff did testify in the first place that defendant's salesman wrote " & blk " on the order, after plaintiff told him to put it on, but he afterwards said that he did not remember whether the salesman wrote it, and admitted that it was possible that he himself wrote the words there before the order was finally closed. The plaintiff's witness and employee Kunkin, who testified he was present at the time of the sale, stated on direct-examination that although the defendant's salesman wrote " dark blue " on the paper, the plaintiff, not defendant's salesman, put down " & blk " at the time the order was given.

The question as to the contract made by the parties was peculiarly one for the jury, and the fact that the trial judge would have decided the issue in favor of defendant did not warrant his setting the verdict

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aside. The power vested in a trial court to set aside a manifestly unjust verdict, where it is clearly the result of passion, prejudice or corruption, was not intended to establish the proposition that the verdict of a jury on questions of fact shall not be permitted to stand unless it is in harmony with the views of the justice presiding. Where the evidence is conflicting on material points and there is sufficient evidence to justify the findings of a jury, the setting aside of the verdict by the court is an improper exercise of judicial discretion. *Berkowitz* v. *Consolidated G. Co.*, 134 App. Div. 389; affd., 201 N. Y. 512; *Perlman* v. *Brooklyn Heights R. Co.*, 78 Misc. Rep. 168.

There were no errors committed during the trial prejudicial to the respondent.

Order reversed, with costs to appellant, and verdict reinstated.

GAVEGAN and MULLAN, JJ., concur.

Order reversed, with costs to appellant, and verdict reinstated.

BORDEN'S FARM PRODUCTS COMPANY, INC., et al., Plaintiffs, *v.* FRED J. STERBINSKY, Individually and as President of MILK WAGON DRIVERS' UNION, LOCAL No. 584, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, etc., Defendants.

(Supreme Court, Kings Special Term for Motions, January, 1922.)

Injunction — conspiracy — labor unions — mandatory injunction granted requiring former drivers of milk wagons to surrender route books — books deposited in court for inspection by both parties.

By a contract of employment between the plaintiff milk companies and the drivers over their various milk routes, providing that each driver should receive a salary and commissions

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on collections, it was agreed that the driver should fully account for and pay over to his respective company such collections and should deposit a certain sum, in some cases $150 and in some cases less. It was the duty of the respective drivers to enter in the route book delivered to them by the plaintiff companies the various sales effected by said drivers during the month and at the end of the month to turn back to the company the books, balance to show the amount due to the respective companies from the customers dealt with by the respective drivers. The drivers who are members of the local labor union went on strike the last day of October, 1921, and with substantial unanimity refused to turn in the route books. In an action charging the president and members of the local union with conspiring to withhold the route books, the prayer for judgment contained the following: "That defendants be required to surrender and deliver all route books in their custody and possession to the respective plaintiffs issuing them." *Held*, that though the court was satisfied that a mandatory injunction requiring the defendants and each of them to deliver the route books to the control and possession of the plaintiff companies was proper, yet because each of the individual drivers by virtue of the entries made by each, of his October sales, has also the property rights or interest in the book issued to him, the relief demanded by the complaint should be modified so as to direct that the defendant local unions, their officers, agents, and each and every one thereof who had not returned their books to the respective plaintiff companies, shall deposit said books in court, where, under the order of the court, either side may have such proper access to them as may protect the interests of each of them.

MOTION for mandatory injunction.

Alger & Coughlan (Walter Gordon Merritt, of counsel), for the motion.

John B. Johnston, in opposition.

DIKE, J. An order is here sought requiring the defendants and each of them to deliver certain route books in their respective custody, control and posses-

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sion to the respective plaintiffs, the plaintiffs being various milk companies, and the ones against whom this order is especially sought are the drivers of the milk routes for the various plaintiff companies, such delivery of route books to the plaintiffs to be made into this court, subject to the rights of the respective plaintiffs in interest, to inspect and copy therefrom under such regulations as the court may prescribe.

From the affidavits it appears that a contract of employment was entered into between the respective plaintiffs and the drivers of their various milk routes. That while there may be some modifications in the contracts as made by the plaintiff companies, in the main, they provide for a salary to each driver, commissions on collections, and it was also agreed that the driver shall fully account for and pay over to his respective company such collections and each driver shall deposit a certain sum, in some cases $150 and in some cases less. In the route books so delivered by the respective plaintiff companies to the drivers it was the duty of the respective drivers to enter the various sales made and effected by said drivers during the month and at the end of the month to turn back to the company the books balanced by the driver showing the amount due to the respective companies from the customers dealt with by the respective drivers. This balanced book, therefore, became the basis of a personal accounting between the plaintiff companies and their respective drivers, and while the book itself was the property of the plaintiff companies and the entries of sales were of obvious vital interest to the plaintiff companies, such entries became equally of interest to the drivers as a basis for their commissions in many cases.

This is another phase of the situation that has developed between the plaintiff companies and the

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defendants under the strike of the drivers that was called on October 31, 1921. The preliminary injunction that was obtained by the plaintiff companies dealt with this phase of the situation and forbade the defendants from attempting to interfere with the plaintiffs "by collecting moneys from any customers of the plaintiffs on account of sales of milk made to said customers on behalf of any of the plaintiffs and by destroying or defacing the route books which may be in the custody or possession of said local unions Nos. 584, 147 or 125 or any of their officers or members." And in the complaint, the prayer for judgment contains the following: "That defendants be required to surrender and deliver all route books in their custody and possession to the respective plaintiffs issuing them."

It appears that the members of Local Union No. 584, who went on strike have, with substantial unanimity, refused to turn in the route books. The total number of books so withheld, according to one affidavit, is 2,200 books. The total number of customers on said books is over 400,000. The amount of uncollected accounts is stated to be over $1,500,000. On an average, about 225 customers, with their addresses, should appear in each individual book. It is obvious that a serious situation arises because the plaintiff companies are powerless, by not possessing these books, to know who their customers for the month of October were and what the amount of the individual indebtedness of each customer was.

It is apparent that the individual members of the unions cannot be punished for contempt in case any order of the court should be made directed against them unless the court is satisfied that they have knowledge of the injunction, it being conceded that none of the individual drivers have been served and that the

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president of the union alone has appeared. If, however, the court is satisfied that such defendant drivers have knowledge, it would seem that they would be amenable to punishment.

The unionization of labor has developed rapidly in the last few years and the organizations have become more elaborate as well as more extensive. The court must assume that in such labor unions there is complete organization as would be expected in such elaborate associations, that members are amenable to discipline and that members are subject to notice from their officers. It is inconceivable, after the publicity given to the injunction order of Mr. Justice Kelby, that any member of these unions is ignorant of its provisions. The injunction here runs against the president named and each and every one of its members. In the case of *People ex rel. Stearns* v. *Marr*, 181 N. Y. 463, which involved punishment for contempt in violating a strike injunction, the court said in part: "The Iron Moulders' Union was a party to the action and the mandate was addressed not only to it and 'its each and every member,' but to all the defendants, their agents, representatives and coadjutors, as well as to those connected with them. The appellants were members of the union, were employed by it to act as pickets around the plaintiffs' plant, and each was paid at the rate of a dollar a day for his services in that capacity. They were parties to the injunction because they were mentioned therein as members of the union. They were the agents and employees of a party, *eo nomine*, engaged in doing its work and subject to the same punishment as if they had all been formally named as parties defendant." There are other cases, such as *Russell & Sons* v. *Stampers & Gold Leaf Local Union No.* 22, 57 Misc. Rep. 96; *Bossert* v. *Dhuy*, 166 App. Div. 251, 253, and in the United States court in the case

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of *Wallace* v. *Adams*, 204 U. S. 415. In the New York cases, knowledge on the part of the persons not made parties by name seems to be an essential element, as is set forth in *People ex rel. Stearns* v. *Marr, supra,* and *Rigas* v. *Livingston,* 178 N. Y. 20, and *Matter of Lennon,* 166 U. S. 548, where it is said: "To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual knowledge."

The gist of the bill of complaint is conspiracy. It is urged that the members of Local Union No. 584 are conspiring together to withhold the route books. Another Union Local No. 147, upon direction of its president, immediately delivered the route books to the respective employers. I, therefore, feel that a mandatory injunction is proper, but I also feel that each of these drivers by virtue of the entries made by each one of his October sales, has also a property right or interest in the book issued by the respective plaintiff companies, and it is for that reason that I modify the relief demanded by the plaintiff companies and direct that the defendant local unions, their officers, agents, and each and every member thereof who have not returned their books to the respective plaintiff companies shall deposit said books in this court, where either side may have such proper access to them under order of the court, as may protect the interests that each may have therein.

Motion granted.

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BERNARD MECHLER and AMELIA MECHLER, Plaintiffs, v. FRANK DEHN and ELIZABETH DEHN, Respondents.

(Supreme Court, Queens Trial Term, January, 1922.)

Boundaries — ejectment — disputes as to location of boundary line — conveyances according to map — generally excess should be divided or deficiency borne by all lots proportionately, but where map of plot shows lots of regular size and a few of irregular size the lots of irregular size are deemed remnants and bear the shortage.

Where land is conveyed by reference to a plan or map, and there is more or less in the entire tract which has been divided than the map shows, no grantee is entitled to any preference over the others and the excess should be divided among or the deficiency borne by all of the lots in proportion to their area.

Where, however, a map shows a plotting of a considerable tract and the creation of lots of regular width and depth, if a few of them are of irregular dimensions they are deemed to be the remnant of what remained of the entire tract after plotting the regular lots, and if there is a shortage in the entire frontage, the irregular sized lots must bear it, this, upon the assumption that it was the intention of the owner to get as many regular sized lots as possible and that whatever remained of the frontage was to go into the irregular shaped plot, and hence if he had more or less than the map showed, the difference in the frontage would affect only the irregular lots.

A map of a tract of land filed by the owner in the office of the county clerk showing 500 lots or more disclosed that it was his intention to create lots regular in shape with a width of 25 feet and a depth of 100 feet. According to the map the frontage of one of the blocks bounded north by a turnpike, east by an avenue, south by a street and west by the land of another owner, and in which lies the property of plaintiff and defendant, is 211 feet 3 inches along the avenue, but as matter of fact the block measures only 206 feet 2 1/8 inches. The owner laid out four lots fronting on the avenue and then, in the belief that there remained 111 feet and 3 inches, he made that the depth of the lot laid out as fronting on the turnpike. All deeds of the property in question, including those from the common owner, referred to the map, and it clearly appeared

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that neither the plaintiffs nor their predecessor obtained title to a plot that extended 111 feet and 3 inches along the avenue. *Held*, in ejectment, a dispute having arisen as to the location of the boundary line between plaintiffs' and defendants' properties, that plaintiffs did not own 111 feet and 3 inches on the avenue but only 106 feet 2 1/8 inches, and that defendants were entitled to judgment, with costs.

ACTION in ejectment.

Joseph Danziger, for plaintiffs.

Leonard J. Langbein, for defendants.

CROPSEY, J. A dispute as to the location of the boundary line between plaintiffs' and defendants' properties in this ejectment action arises from the fact that the former owner of the entire tract thought there was a greater frontage in the block than in fact there was. In 1881 a party named Morton, owning a tract of land at Middle Village, Queens county, caused a map to be made plotting it into lots. Ten years later this map was filed in the clerk's office. The map shows some 500 lots or more. From it it is evident that it was the intention to, wherever possible, create lots regular in shape with a width of 25 feet and a depth of 100 feet. The properties in question lie in one of the blocks shown on this map. That block is bounded on the north by the Williamsburg and Jamaica turnpike, on the east by Morton avenue, on the south by Steuben street and on the west by property of another owner. According to the map the frontage of this block along Morton avenue is 211 feet 3 inches. As matter of fact the block measures only 206 feet 2⅛ inches. The land facing the turnpike is laid out into lots fronting thereon. The lot on the corner of the turnpike extends south along Morton avenue, according to the map, 111 feet 3 inches. The map shows four lots each 25 feet wide and 100 feet deep fronting on Morton avenue between the south-

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erly end of the lots fronting on the turnpike and Steuben street. The other lots in this block front on Steuben street and each is 25 feet wide by 100 feet in depth, except the most westerly one which abuts on land of another owner, and that is 25 feet 6 inches in width by 100 feet in depth. The map carries the width of all the lots fronting on the turnpike, except one, as 25 feet. The most westerly one, that is the one abutting on property of another owner, is shown to be 22 feet in width. The map shows that the turnpike does not run parallel to Steuben street but that they slightly converge as they go toward the west. This appears from the fact that the easterly line of the corner lot (the one abutting on Morton avenue) is 111 feet 3 inches, as already stated, and the westerly line of the most westerly lot (the one abutting on property of another owner) is 100 feet, and the southerly line of all the turnpike lots is 100 feet from Steuben street.

The plaintiffs own lots Nos. 1 and 2. They front on the turnpike at the corner of Morton avenue. According to the map they measure 111 feet 3 inches on Morton avenue and extend to a point that is 100 feet north of Steuben street. The defendants own lot No. 27, which fronts on Morton avenue and abuts plaintiff's property. According to the map the northerly line of this lot is 111 feet and 3 inches south of the turnpike. This lot is 25 feet in width by 100 feet in depth. According to the map there are three other similar sized lots between it and Steuben street. The plaintiffs claim that they own 111 feet and 3 inches along Morton avenue. If they do then there remains but 94 feet and 11⅛ inches between their property and Steuben street. According to the map there is 100 feet between their property and Steuben street. The defendants claim the lot they own begins 75 feet north

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of Steuben street and is 25 feet in width on Morton avenue. If that is so then the northerly side of their lot is 106 feet 2⅛ inches south of the turnpike. The question in dispute is who owns the strip that is 5 feet and ⅞ of an inch wide on Morton avenue and the northerly side of which is 106 feet and 2⅛ inches south of the turnpike. Or, to put it another way, as there is a shortage in this block who must bear it, or how should it be apportioned?

All the deeds of the property in question, including those from the common owner, refer to the map that has been mentioned. The references to it are not alike in all the conveyances but it is seemingly conceded that all the deeds do refer to it. The first deed from the common owner was made in 1886 to a party named Gebhard. This conveyed, besides other property, five lots in this block numbered 1, 2, 3, 4 and 5. According to the map these all front on the turnpike, lot No. 1 being on the corner of Morton avenue. After expressly designating these lots by their map number the deed says that taken together they "are bounded and described and contain as follows: viz. Commencing at a point on block 6 (VI) formed by the westerly side of Morton Avenue where it intersects with the southerly side of the Williamsburg and Jamaica Turnpike Road and running thence westerly along the southerly side of said Turnpike Road one hundred and twenty-five feet (125′); thence southerly parallel with Morton Avenue one hundred and seven feet and six inches (107′ 6″); thence easterly parallel with Turnpike Road one hundred and twenty-five feet (125′) to Morton Avenue; thence northerly along the westerly side of Morton Avenue one hundred and eleven feet (111′) and three inches (3″) to the point or place of beginning, be the said measurements more or less." This description is erroneous, as it shows

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upon its face, for it makes the plot a parallelogram by saying the opposite lines are parallel to each other but then contradicts this by giving dimensions which make it impossible. And as has been stated, the turnpike does not run parallel to Steuben street. This is also established by another survey in evidence. According to the map the southerly line of these lots is parallel to Steuben street, but not to the turnpike. It is evident the conveyancer was not sure of his data, for he wrote in that all the dimensions were "more or less."

The second deed from the common owner was made in 1898 to a party named Bermel. It conveyed five lots numbered 26, 27, 28, 29 and 30. The deed besides designating the lots by number stated "Said 5 lots containing 12,500 square feet more or less. Said lot being shown on the following diagram and agreeable to said map." There is no other description in this deed except as stated here. Nor is there any diagram or map attached to the deed. The map referred to in the deed is the one already mentioned. According to the map these five lots are each 25 feet wide by 100 feet in depth and contain exactly 12,500 square feet. Four of them, to wit, Nos. 27, 28, 29 and 30 front on Morton avenue and the other one, No. 26, fronts on Steuben street immediately in the rear of the other four. Lot No. 30 is at the corner of Steuben street and Morton avenue. Next comes lot 29 and then lot 28 and then lot 27.

These two deeds conveyed the entire frontage on Morton avenue between the turnpike and Steuben street and include the properties in question.

The next deed is by Bermel to the defendants. It was made in 1906 and conveyed lot 27. The only description in the deed was by lot number and the statement that it was part of the premises conveyed to Bermel by Morton.

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The next conveyance was made in 1913 by Gebhard to the plaintiffs. This conveyed lots Nos. 1 and 2. It then says that those lots taken together are bounded and described as follows:

"Beginning at a point formed by the intersection of the Southerly side of Williamsburgh and Jamaica Turnpikes with the Westerly side of Morton Avenue, and running thence Southerly along the Westerly side of Morton Avenue, 111 feet, 3 inches; thence Westerly along the Northerly side of lot 27 on said map, fifty (50) feet; thence Northerly parallel with Morton Avenue 109 feet to the Southerly side of Williamsburgh and Jamaica Turnpikes; and thence Easterly along the Southerly side of Williamsburgh and Jamaica Turnpikes fifty feet (50) to the point or place of beginning."

This description does not agree with the map in one particular. It says that the length of the westerly boundary, that is the course that runs "northerly parallel with Morton avenue to the Turnpike" is 109 feet. The map shows this course to be 109 feet and 9 inches. The reference in this deed to lot 27, which is defendants' property, seems to refer merely to the lot as laid out on the map and not to the lot as occupied or possessed.

Upon the facts as stated I think it clearly appears that neither the plaintiffs nor their predecessor obtained title to a plot that extended 111 feet and 3 inches along Morton avenue. Had the frontage of that block been as represented on the map unquestionably such would have been the result. But that frontage was over 5 feet shorter than the map showed it to be. As the common owner had title to the entire block frontage if his first conveyance, which was to plaintiffs' predecessor, had conveyed a plot 111 feet 3 inches in depth along Morton avenue, and had not

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made the conveyance by reference to the map, unquestionably title would have passed to the entire 111 feet and 3 inches. But this conveyance was by reference to the map and conveyed merely certain lots mentioned thereon. The fact that after describing the property by lot numbers on the map in question the deed set forth what was said to be a description of them by metes and bounds does not change the result. The map controls and not the dimensions in the deed. *Brainin* v. *N. Y., N. H. & H. R. R. Co.*, 136 App. Div. 393, 395; *Meyer* v. *Boyd*, 51 Hun, 291, 295; *Wessel* v. *Cramer*, 56 App. Div. 30, 32. While according to the map these lots extended 111 feet and 3 inches along Morton avenue the same map also showed that their southerly line was 100 feet north of Steuben street. Both of these distances could not be accurate because of the shortage. And the fact that the plaintiff's lots were first conveyed by the common owner under the circumstances appearing here makes no difference.

All that has been said concerning the conveyance to the plaintiffs' predecessor is equally applicable to the deed to the defendants' predecessor, except that in that deed there was no description other than by lot numbers. Both of these deeds from the original owner seem to show that there was some question as to the accuracy of the map. In the deed to plaintiffs' predecessor all the dimensions given are said to be "more or less." And in the deed to defendants' predecessor, while the area of the five lots is stated, it is said to be "more or less." But even if the area had been positively stated it would have been matter of description only (*Jackson* v. *Cole*, 16 Johns. 257, 261), and would not have controlled. The sale of the lots by numbers with reference to the map would have determined what passed by the deeds.

The general rule is that where land is conveyed by

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reference to a plan or map, and there is more or less in the entire tract which has been divided than the map shows, no grantee is entitled to any preference over the others and the excess should be divided among or the deficiency borne by all of the lots in proportion to their area. *Coppin* v. *Manson*, 144 Ky. 634; *Anderson* v. *Wirth*, 131 Mich. 183; *Quinnin* v. *Reimers*, 46 id. 605; *Gloyd* v. *Franck*, 248 Mo. 468; *Marsh* v. *Stephenson*, 7 Ohio St. 265; *Booth* v. *Clark*, 59 Wash. 229; *Clayton* v. *Feig*, 179 Ill. 534; *Mosher* v. *Berry*, 30 Me. 83; *Parks* v. *Boynton*, 98 Penn. St. 370; *Westcott* v. *Craig*, 60 Col. 42; 4 R. C. L. 115. See, also, other cases cited in Anno. Cas. 1912-A, 1273–1275, note.

While this is the general rule there is an exception to it which I think applies here. It is this. Where a map shows a plotting of a considerable tract and the creation of lots of regular width and depth, if a few of them are of irregular dimensions they are deemed to be the remnant of what remained of the entire tract after plotting the regular lots and if there is a shortage in the entire frontage the irregular sized lots must bear it. This is held upon the assumption that the owner intended to get as many regular sized lots as possible and that whatever remained of his frontage was to go into the irregular shaped plot and hence if he had more or less than the map showed the difference in the frontage would effect only the irregular lot. *Baldwin* v. *Shannon*, 43 N. J. L. 593, 596; *Barrett* v. *Perkins*, 113 Minn. 480, 485. In the case last cited the court says (at p. 485): "In a situation like that the owner of the plat must be deemed to have intended to constitute the irregular remnant a lot by itself, regardless of its dimensions, and a purchaser thereof takes the whole remnant, whether of greater or less area than that indicated by the plat. It cannot be

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enlarged at the expense of the owners of other lots, nor, if of greater area than shown by the plat, diminished in their favor. Though the rule might in a given case work a hardship to the owner of the remnant lot, yet in the case at bar the combined injury to the owners of the other lots, arising, if defendant be sustained, from the displacement of their improvements and the total elimination of the owner of lot 1, far outweigh any disclosed damage or hardship to defendant. The rule furnishes a definite and safe method and guide for the determination of mistakes of this nature."

The same rule applies where plots of regular size are laid out on a map and a portion remains, the dimensions of which are not stated. *Pereles* v. *Gross*, 126 Wis. 122. But the same court which decided the case last cited has held that wnere all the lots are given dimensions upon the map they should bear any shortage ratably and that it should not be taken wholly from the one lot which is of different size than the others, thus holding to the contrary of the cases in New Jersey and Minnesota, above cited. *Pereles* v. *Magoon*, 78 Wis. 27. I think the reasons given in the other cases, however, justify the conclusions reached and that they state the correct rule.

This rule seems especially applicable here. The common owner plainly intended to create lots of a uniform width of 25 feet and a depth of 100 feet. He laid out four such lots fronting on Morton avenue and then believing there remained 111 feet and 3 inches he made that the depth of the lots that he laid out fronting on the turnpike. It cannot be supposed that had he known the frontage was only 206 feet and some inches he would have cut down the width of the 25 foot lots. The whole map is contrary to such a suggestion. Hence it follows that the plaintiffs do

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not own 111 feet and 3 inches on Morton avenue but only 106 feet 2⅛ inches.

The defendants are entitled to judgment with costs. New findings and judgment in conformity with this decision should be submitted upon notice.

Judgment for defendants.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. SCHENECTADY ODD FELLOWS TEMPLE ASSOCIATION, Relator, v. WILLIAM F. MCMILLAN and Others, Comprising the Board of Assessors of the City of Schenectady, N. Y., Respondents.

(Supreme Court, Schenectady County, January, 1922.)

Taxation — certiorari — property of fraternal order — statutes exempting property construed against owners — lodge building devoted to many and different purposes not exempt — by-laws held to permit use of surplus for purposes not contemplated by statute — Benevolent Orders Law, § 7 — Tax Law, § 4(7).

Under the rule that statutes exempting property from general taxation must be strictly construed against the property owners, and that exemption may not be presumed unless plainly expressed, it is clear that section 7 of the Benevolent Orders Law, under which relator was incorporated, and section 4(7) of the Tax Law, under which relator claims exemption of its real property from taxation, contemplate a building to be used for lodge purposes with an occasional use for other fraternal purposes, and not a building as here shown devoted to and used for many and different purposes.

While section 6 of the relator's by-laws directs the use of all surplus moneys for certain benevolent purposes which are within the contemplation of the statute, it also specifies "such other benevolent or charitable purposes as the board may direct," and so permits the board to direct the use of the surplus for purposes not contemplated by the statute, and for all these reasons the writ of certiorari to review the assessment herein will be dismissed.

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CERTIORARI to review assessment upon real property.

Fryer & Lewis, for relator.

George B. Smith, corporation counsel, for defendants.

WHITMYER, J. This is a proceeding to review the 1920 assessment of $20,000 upon relator's real property, at the corner of Hawk and State streets, Schenectady, N. Y., solely upon the claim that the property is not assessable, under section 4, subdivision 7 of the Tax Law. This section first exempts the real property of a corporation or association organized exclusively for religious, bible, tract, charitable, benevolent and other purposes and then exempts "the real property of any fraternal corporation, association or body created to build and maintain a building or buildings for its meeting or meetings of the general assembly of its members, or subordinate bodies of such fraternity and for the accommodation of other fraternal bodies or associations, the entire income of which real property is exclusively applied or to be used to build, furnish and maintain an asylum or asylums, a home or homes, a school or schools, for the free education or relief of the members of such fraternity, or for the relief, support and care of worthy and indigent members of the fraternity, their wives, widows or orphans." The claim here is based upon the portion of the section which has been quoted. Relator is a joint corporation, formed in 1912, under section 7 of the Benevolent Orders Law, which provides, so far as material, that "any lodges * * * within the state, chartered by the grand lodge of the Independent Order of Odd Fellows, * * * and any number of subordinate lodges, tribes or other bodies of any benevolent or fraternal order or society,

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incorporated under or pursuant to the laws of this state, may unite in forming a corporation for the purpose of acquiring, constructing, maintaining and managing a hall, temple, or other building * * *." Mohawk Valley Lodge No. 12 and Champion Lodge No. 554 of the order, each a subordinate lodge duly chartered by the grand lodge, united in the formation. Section 3 of article I of the by-laws states the purpose. It reads as follows: "The purpose of the association shall be to purchase building, constructing, maintaining and managing building or hall for lodge purposes." Section 6 of said article prescribes how the moneys from rentals shall be used, as follows: "All moneys derived from rentals of said building or hall to be used for defraying cost and expenses of same and all surplus moneys derived from said building or hall to be used for benevolent purposes, namely, Odd Fellows Homes, Homes for Aged and Invalid Odd Fellows, Aged Odd Fellows and widows of Odd Fellows, Homes for Orphans of Odd Fellows and such other benevolent or charitable purposes as the Board may direct." Mohawk Valley Lodge bought the lot and conveyed it to the association. The cost was $7,000. The association built the building, a two-story brick building, with basement. The heating plant, three bowling alleys and one pool table, are in the basement, the assembly room is on the first floor and the lodge rooms are on the second floor. The cost of building was $24,000. It was financed by a mortgage for $18,000, balance by notes at six per cent, held mostly by the forming lodges. Now, the mortgage is $4,000 and the notes amount to about $24,000. And the said lodges seem to hold about one-half in amount. The bowling alleys and pool table are public and the revenues from same go to the janitor in lieu of pay. The revenue tax on same is

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paid by the association and, if the use of the basement for election or other purposes prevents the letting of the alleys and table, then the association is required to pay the janitor about $5 per day. The revenue tax for 1919 was $50. The assembly room has been let to other organizations, not connected with the Odd Fellows, when not in use by the lodges. The lodge rooms have been occupied by Champion and Mohawk Valley lodges and, also, by Dorpian Encampment and the Rebekahs, affiliated bodies, and they have paid rent. The total receipts from rentals were $3,234.85 for 1918 and $4,033.22 for 1919. Of these amounts, the lodges paid $1,039 in 1918 and $986.50 in 1919. The balance, namely, $2,195.85 for 1918 and $3,046.72 for 1919 came from sources not connected with Odd Fellowship and consisted of rentals from different associations, such as bible students, commercial travelers, Masons, Gospel Mission, G. A. R. Ladies, Jewish Society, Civic Club, Old Maids' Convention, Orangemen, Lambs' club, Maqua Company, Triple Alliance and, especially, rentals from dancing. The total charge for expenses for 1918 was $3,534.50. The deficit claimed for that year was $299.65. The total charge for expenses for 1919 was $3,696.52. The income shown for that year was $336.70. The treasurer testified that there had been a deficit each year since organization, and that it had been carried forward each year, but it seems that he is mistaken, because the figures above, based upon his evidence, are exclusive of deficits. The total charges for maintenance and repairs amounted to $2,289.10 for 1918 and to $1,894.08 for 1919. The amounts seem large. Examining them, we find, for 1918, items of $150, part payment and exchange of piano, and $50 redemption of notes, and for 1919, $375, for electric fans, besides other items for merchandise of various kinds, each

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year. Without these, the 1918 account would have shown a net income and the 1919 account a larger net income. The receipts and disbursements for 1920 were along the same lines.

Now, it is well settled that statutes exempting property from general taxation must be strictly construed against the property owner and that exemption may not be presumed, if it is not plainly expressed. *People ex rel. Young Men's Assn.* v. *Sayles,* 32 App. Div. 197, 201; affd., 157 N. Y. 677. Under this rule, which must be applied here, it seems clear that the section of the Benevolent Orders Law, under which relator was incorporated, and the section of the Tax Law, under which it claims exemption, contemplate a building to be used for lodge purposes, with an occasional use, perhaps, for other fraternal purposes, and not a building devoted to and used for the many and different purposes here shown. *People ex rel. N. Y. Lodge No. 1* v. *Purdy,* 179 App. Div. 805, 809; affd., 224 N. Y. 710; *People ex rel. Mizpah Lodge* v. *Burke,* 228 id. 245. And, relator's by-laws specify lodge purposes only. But, even if the statutes and by-laws and the use of the property do not prevent exemption, still the property is not exempt, unless it appears that the entire net income therefrom was and is exclusively applied or to be used for the purposes enumerated in the statute. *People ex rel. N. Y. Lodge No. 1* v. *Purdy, supra.* And it has not been so applied, notwithstanding that a net income was shown for 1919, and that one actually existed for 1918, the two years concerning which evidence was given. Relator has not construed the words "surplus moneys," as used in its by-laws, in the sense that the words "entire net income" are used in the statute. Finally, it should be noted that, while section 6 of the by-laws directs the use of all surplus moneys for certain

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benevolent purposes, which are within the contemplation of the statute, it also specifies "such other benevolent or charitable purposes as the board may direct." This permits the board to direct the use of the surplus for benevolent or charitable purposes not contemplated. For these reasons, it becomes necessary to dismiss the writ.

Ordered accordingly.

A. H. WOODS THEATRE COMPANY, INC., Plaintiff, *v.* JOHN F. GILCHRIST, Commissioner of Licenses of the City of New York, Defendant.

(Supreme Court, New York Special Term, January, 1922.)

Municipal corporations — city of New York — injunction — commissioner of licenses has power to revoke theatre license.

The commissioner of licenses of the city of New York has legal power to revoke a theatre license, and a motion for an injunction *pendente lite* in an action to restrain the exercise of such power will be denied.

MOTION for injunction *pendente lite.*

Max D. Steuer, for plaintiff.

John P. O'Brien, corporation counsel, for defendant.

WAGNER, J. The plaintiff seeks to restrain the defendant commissioner of licenses of the city of New York from revoking the license of the Eltinge Theatre. The commissioner has given written notice to plaintiff that in his judgment the play, "The Demi-Virgin," being produced at the theatre of which plaintiff is licensee, is indecent and immoral; that its public exhibition is subversive of public morals, and that if its exhibition is not discontinued he will revoke the

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license of the theatre. Hence this application to enjoin the commissioner from executing such purpose, basing its prayer for judicial aid upon the sole ground that the commissioner is without legal power to revoke a theatre license.

An examination of the history of the statutes and ordinances that are applicable convince me that the commissioner has the authority to revoke the license which is the subject of this litigation. The office of commissioner of licenses was created and his powers and duties defined by chapter 475 of the Laws of 1914. That statute became effective April 20, 1914. Prior to that date the authority to issue theatre licenses and for similar places of amusement was vested in the police department of the city; the power to revoke such licenses was vested in "any judge or justice of any court of record in said city upon proof of a violation of any of the provisions of this title." It is manifest, therefore, that the power of revocation vested in the court was a limited one. It could only be exercised upon the ground that certain offenses, specified in that particular title of the charter (tit. 2, chap. 22), had been committed. For offenses not included in the aforementioned title or for other reasons, there does not seem to have been any statutory authority for the revocation of such licenses prior to April 20, 1914. Section 1476 of the charter, which is the source of this judicial authority to revoke licenses, was, in June, 1914, enacted as an ordinance, and is section 4 of article 1 of chapter 3 of the Code of Ordinances, which again in express terms prescribes the particular remedy for a violation of any provision of this article. Chapter 475 of the Laws of 1914, which became a law on April 20, 1914, provides among other things as follows: "The commissioner of licenses shall have cognizance and control of the granting, issuing, trans-

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ferring, renewing, revoking, suspending and canceling of all licenses in relation to theatres and concerts now issued by the police commissioner." This constitutes a general and definite grant of power to the commissioner. Under this grant he is vested with powers and duties of a universal nature, except where the universality of the grant is delimited by specific provisions of law. The only inconsistent specific provision which encroaches on this authority of the commissioner is found in the provisions of section 1476 of the charter and the city ordinance which adopted the words of that section. But these provisions relate to revocations for offenses against title 2 of chapter 22 of the charter, and at most, if at all, authority only to revoke for such offenses is taken from the commissioner. So far as those particular offenses are concerned, it might be possible that the power to revoke is lodged solely in a judge or justice of a court of record, although it might be more convincingly urged that the enactment of chapter 475 of the Laws of 1914 operates as a repeal of the provisions placing such powers to revoke in the judges or justices of a court of record. Whether such repeal was in fact effected, however, does not change the determination of the particular question in issue here, since we are not concerned with an offense specified in title 2 of chapter 22 of the charter. It is not essential, therefore, to decide whether the commissioner is excluded from authority to revoke licenses for any such violation. Out of the obscurities and, perhaps, inconsistencies of the law on this question, there survives unmistakably the legislative mandate that the commissioner shall have general authority to revoke such licenses at least for other reason than the violations against title 2 of chapter 22. That this was the legislative intent is obvious by the consideration of the fact that if the commissioner has no such power no one has.

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The plaintiff further urges that to give a ministerial officer such power would be to establish him a censor over all theatrical productions. The power of revocation is an administrative function and not an act of censorship. For if it be exercised capriciously, arbitrarily, upon unreasonable apprehension or upon false information, the courts, if appealed to, will stay the administrator's hand. Nor is the placing of the power to revoke in the hands of a delegated official an abridgment of the right to the free expression of thought, as is contended. It may only be exercised to prevent the production of what in his judgment is an immoral or indecent play and offensive to the public conscience.

The power existing, its threatened exercise under the circumstances will not be restrained.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK v. MORRIS ISSENOFF, Defendant.

(Court of General Sessions of the Peace, in and for the County of New York, January, 1922.)

Criminal procedure — discharging bail where indictment for grand larceny pending, not ground for new trial of one convicted of receiving the stolen property.

Where an indictment for grand larceny is still pending the fact that an order has been entered discharging the bail for defendant is not ground for a new trial of one convicted of criminally receiving the alleged stolen property.

MOTION for a new trial on the ground of newly discovered evidence, made after judgment convicting defendant of criminally receiving stolen property in the first degree.

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Slade & Slade (David Slade, of counsel), for motion.

Joab H. Banton, district attorney (Felix C. Benvenga, of counsel), in opposition.

NOTT, J. The defendant's contention is that he was convicted of criminally receiving stolen property on the theory that he aided and abetted one Bleiweis and others in the commission of a crime. The moving affidavit then sets forth that the indictment charging Bleiweis and the others with the commission of the crime had been dismissed subsequent to the conviction of the defendant, and that this dismissal of that indictment establishes the fact that those defendants were innocent of the crime and that therefore Issenoff could not be guilty of aiding and abetting in the commission thereof.

Whether the dismissal, subsequent to the trial of this action, of the other defendants' indictment could be deemed to be newly discovered evidence, within the meaning of the statute, is doubtful but it is not necessary to decide that question at the present time. The fallacy of the defendant's contention consists in the assumption that an order dismissing an indictment is necessarily an adjudication that the defendant is innocent. It may, and very often does, simply adjudge that for various reasons the defendant's guilt cannot be established. In this case, however, the moving affidavit is erroneous in its allegation that the indictment has been dismissed. An examination of the records of the court shows that an order has been entered merely discharging bail and the indictment is still pending.

No ground, therefore, is presented justifying the granting of the motion and it must be denied.

Motion denied.

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FRANK H. BELL, Who Sues on Behalf of Himself and All Other Holders of the Preferred Stock of FRANK GILBERT PAPER COMPANY, Who Are Situated Similarly With Himself, Plaintiff, *v.* FRANK GILBERT PAPER COMPANY, LOUIS M. JOSEPHTHAL, HENRY J. SCHNITZER, CHARLES C. WALSEY and HERCULES PAPER CORPORATION, Defendants.

ANNA RICHMOND, Suing on Behalf of Herself and All Other Stockholders of the HERCULES PAPER CORPORATION, Plaintiff, *v.* LOUIS M. JOSEPHTHAL, HENRY J. SCHNITZER, MAX HOLZ and HERCULES PAPER CORPORATION, Defendants.

JAY GILBERT, Who Sues on Behalf of Himself and All Other Holders of the Preferred Stock of FRANK GILBERT PAPER COMPANY, Who Are Situated Similarly With Himself, Plaintiff, *v.* FRANK GILBERT PAPER COMPANY, LOUIS M. JOSEPHTHAL, HENRY J. SCHNITZER, LOUIS M. BOWMALL, NICOLAS J. GEBOLD, D. S. GOTTESMAN, JACOB L. HOLTZMAN, N. JOHANESON, A. W. MAYNES, HERCULES PAPER CORPORATION and UNION WAXED AND PARCHMENT PAPER COMPANY, Defendants.

(Supreme Court, Saratoga County, January, 1922.)

Corporations — when stockholders entitled to an order of discovery and inspection of the books and documents of corporations —referee appointed to superintend discovery and inspection — Civ. Pr. Act, § 1569 — Rules of Civil Practice, rule 142.

Under the Civil Practice Act and the Rules of Civil Practice an order of discovery and inspection of the books and documents of a defendant corporation may be granted provided they relate to the merits of the action.

Where in several actions brought by stockholders for an accounting of the receipts, assets and property of the defendant corporations based upon allegations of mismanagement, waste and misappropriation of their property, the court, upon motion for an inspection of all the books and papers of the

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corporations, is unable to determine when the summonses were served or whether service thereof was made prior to October 1, 1921, on all persons to be served, the court under section 1569 of the Civil Practice Act and in the light of the present Rules of Civil Practice, may, in the interests of justice, apply any remedial provision of said statute not inconsistent with proceedings theretofore taken in said actions.

Where from the complaint it was obvious that a discovery and inspection of the stock books, minute books and books of account of the defendant corporation would disclose matters relating to the merits of the actions, and that an order directing the inspection of all other books, papers, registers, certificates and records of the corporations, except a so-called creditors' agreement, would be too sweeping in its scope and was not justified without more definite reference to the particular books or papers and of their relation to the merits of the actions, an order will be granted permitting a discovery and inspection of the creditors' agreement and of the stock books and minute books of the corporations, and also of their books of account in so far as they relate to the specific allegations of misconduct, waste and misappropriation, set forth in the complaint.

In accordance with rule 142 of the Rules of Civil Practice and to the end that the business of the corporations may not be unduly interfered with, the order will provide for the appointment of a referee to direct and superintend the discovery and inspection, who shall file his certificate entitled in each of the actions, in the county clerk's office, certifying to the compliance or noncompliance with the terms of said orders, which shall set forth the specific matters alleged in the complaint, concerning which discovery and inspection is directed to be had.

APPLICATION by stockholders for an order of discovery and inspection of books and documents of corporations defendants.

Thomas O'Connor (George E. O'Connor and Edgar T. Brackett, of counsel), for plaintiffs.

Shearn & Hare, for defendants Josephthal, Schnitzer and Gerold.

Leventritt, Cook, Nathan & Lehmann, for defendant Hercules Paper Corporation.

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Stanhope Foster, for defendant Frank Gilbert Paper Company.

Tanzer & Lane, for defendant Bowmall.

Lawrence B. McKelvey, of counsel for corporation defendants.

STALEY, J. These are applications on the return of an order to show cause for leave to the plaintiff to have discovery and inspection of the stock books, minute books, books of account, and all other books and papers of the defendant corporations, the Hercules Paper Corporation, Frank Gilbert Paper Company, and Union Waxed and Parchment Paper Company, and for leave for additional discovery and inspection in action No. 2 of the stock books, registers, certificates and records of said Hercules Paper Corporation, at the office of the Bankers' Trust Company, its transfer agent, and at the office of the American Trust Company, the registrar of its stock.

The motions in the three actions were presented and will be considered together.

The actions are in behalf of stockholders for an accounting by the corporations and other defendants named, of the receipts, assets and property of said corporations, coming into their hands and under their control. The plaintiffs allege acts of mismanagement, waste, and misappropriation of the property of said corporations.

The brief of the plaintiff states that action No. 1 is governed by the Code of Civil Procedure, and that actions Nos. 2 and 3 are governed by the Civil Practice Act. The brief of the defendant claims that "All of these actions were begun prior to October first, nineteen hundred and twenty-one, and, therefore, the rights of the various plaintiffs to a discovery and inspection

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must be tested by the provisions of the Code of Civil Procedure and the General Rules of Practice."

I am unable to determine by the papers before me the date when the summonses in these actions were served or whether they were served on all of the persons to be served, prior to October 1, 1921.

It is within the discretion of the court to apply to the applications made in these actions, in the interest of justice, any remedial provision of the Civil Practice Act not inconsistent with proceedings theretofore taken in the action. Civil Practice Act, § 1569. All the applications, therefore, may be considered, in the interest of justice, by applying thereto the remedies and procedure found in the Civil Practice Act, and also must be considered in the light of the present Rules of Civil Practice. Laws of 1920, chap. 902; Laws of 1921, chap. 370.

Under rule 15 of the General Rules of Practice it was necessary that a party applying for discovery and inspection should show, "to the satisfaction of the court or judge the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection."

Under this rule, and the provisions of the old Code, a line of decisions was developed which applied to all applications for discovery and inspection the test of materiality and necessity, of particularizing the information sought, and of establishing the fact that there were entries in the books and papers sought to be examined relative to the merits of the action, in addition to the fact that the books and papers were not in the possession and control of the party applying for the discovery and inspection.

The force of these decisions to the pending appli-

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cations has been broken by the provisions of the new Civil Practice Act and the Rules of Civil Practice. Rule 15 of the General Rules of Practice is no longer binding upon the courts. Chapter 902 of the Laws of 1920, as amended by chapter 370 of the Laws of 1921, provides for the formulation and adoption of suitable rules of practice not inconsistent with the Civil Practice Act, "which shall be binding on all the courts in this state and all the justices and judges thereof," and further provides that "The rules of practice adopted by the convention shall be filed in the office of the secretary of state before October first, nineteen hundred and twenty-one, and shall become effective on that date and shall supersede all general rules of practice theretofore binding on the courts of the state and the justices and judges thereof, except the court for the trial of impeachments and the court of appeals."

The requirements of rule 15 of the General Rules of Practice are not included within the Rules of Civil Practice as formulated and adopted. Rule 140 of the Rules of Civil Practice follows substantially rule 102 of the "Rules of Court" proposed in the report of the joint legislative committee on the simplification of civil practice, and which was presented to the legislature in 1919 and which was required by the statute to be considered by the convention in the formulation of its rules. See Report of Joint Legislative Committee on the Simplification of Civil Practice, 1919, p. 1420.

The note at the end of proposed rule 102 states that, "The general effect of the rule is to shift to the adverse party the burden of showing that the discovery or inspection is not necessary, instead of requiring the party applying for the order to show the necessity in the first instance." Such would seem to be the clear intent and effect of the rule and such effect

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materially changes the rules and force of decisions heretofore applied to applications for discovery and inspection.

Books and documents are, therefore, permitted to be discovered and inspected under the Civil Practice Act and the Rules of Civil Practice, as justice requires, providing they relate to the merits of the action.

Under the common law, a stockholder has the right, which may be enforced by the court, to inspect the books of a corporation of which he is a stockholder. *Matter of Steinway*, 159 N. Y. 250.

While the plaintiffs in the above actions are stockholders their right to discovery and inspection must be considered and determined in their character as litigants, as the applications here made are incidental to the prosecution of the actions and have reference to the merits of the issues therein framed. *Walsh* v. *Press Co.*, 48 App. Div. 333; *Snyder* v. *DeForest Wireless Telegraph Co.*, 113 id. 840.

It is urged by the learned counsel for the defendants that discovery and inspection cannot be granted until after the right to an accounting has been established by interlocutory judgment.

A stockholder of a corporation has no absolute right to compel an accounting to him by the corporation or its officers. An accounting, however, may be decreed, upon proof of official misconduct, but the burden of proof resting upon the stockholder is only met when he established that waste and misconduct, or misappropriation of funds, has actually been committed by the defendants. *Sage* v. *Culver*, 147 N. Y. 341; *Stokes* v. *Stokes*, 87 Hun, 152; *Kreitner* v. *Burgweger*, 174 App. Div. 48.

The interests of justice will not permit a stockholder to be denied the right of discovery and inspection of books and documents, so far as such remedy

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relates to the merits of the action, when such discovery and inspection is essential to afford him the opportunity of establishing the alleged misconduct of the defendants which must be established to grant him the remedy to which he may be entitled. A defendant corporation, through its officers, ought not to be permitted to escape the consequences of misconduct in its management, and shield itself against prosecution therefor, by withholding from a stockholder the evidence necessary for him to successfully assert his rights.

It is obvious from the allegations in the complaint that a discovery and inspection of the stock books, minute books, and books of account of the defendant corporations will disclose matters relating to the merits of the action.

An inspection, however, of all other books and papers, registers, certificates, and records of the defendant corporations, except the so-called creditors' agreement, is too sweeping in its scope, and is not justified upon the papers herein without more definite reference to the particular books or papers and of their relation to the merits of the action.

Plaintiffs may have orders permitting a discovery and inspection of the creditors' agreement and of the stock books and minute books of the defendant corporations, and of the books of account in so far as said books of account relate to the specific allegations of misconduct, waste, and misappropriation set forth in the complaint; and, in order that the business of the defendant corporations may not be unduly interfered with, and that such discovery and inspection may be had within the limits of the orders granted herein, such orders shall provide, in accordance with rule 142 of the Rules of Civil Practice, for the appointment of a referee, to direct and superintend the discovery and inspection as granted by the orders herein, and who

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shall file his certificates at the conclusion of such discovery and inspection, entitled in each of the actions herein, in the Saratoga county clerk's office, certifying to the compliance or non-compliance with the terms of the orders.

Plaintiffs may prepare proposed orders in conformity with this memorandum, and shall set forth therein the specific matters alleged in the complaint concerning which discovery and inspection is herein directed to be had. The orders may be settled by agreement or on three days' notice.

Ten dollars costs awarded to the plaintiff in each action.

Ordered accordingly.

THOMAS E. FLANIGAN, Plaintiff, *v.* EDMUND WATERMAN, Doing Business under the Name of E. WATERMAN & Co., Defendant.

(Supreme Court, Washington County, January, 1922.)

Sales — Statute of Frauds — buyer not required at time of sale to accept goods or to receive any part thereof — defendant's statement that he had bought a certain boatload of potatoes constitutes an acceptance — place of delivery — purchaser assuming dominion over goods — liability of defendant for purchase price confirmed by letter deferring payment — motion for new trial denied — Personal Property Law, §§ 85(3), 124(3).

The Personal Property Law, section 85 (Laws of 1909, chap. 45, as amended by Laws of 1911, chap. 571), does not require that at the time of a sale of goods the buyer shall accept or receive any part thereof.

In an action by a cultivator of seed potatoes to recover $11,124.86, the purchase price of a cargo of seed potatoes sold to defendant, a New York potato dealer, under an oral contract upon which no earnest money was paid, proof that defendant stated to two or three other potato growers, that he had bought this particular boatload from plaintiff,

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constitutes an acceptance thereof by defendant under section 85(3) of the Personal Property Law which provides that, "There is an acceptance of goods within the meaning of this section when the buyer, either before or after the delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

The plaintiff on the same day that he notified defendant that the potatoes were in the canal boat *Malinda Reilly* notified the captain that he had sold the potatoes to the defendant, having previously informed the captain of the sale, and advised him to call on defendant in a day or two to find out when he would start to unload the boat. After the captain over the telephone had told defendant plaintiff's name and the name of the boat, defendant told him he would start the boat next Monday or a week from Monday and the captain said that would be all right. In the same conversation the defendant admitted that the potatoes had been sold to him by the plaintiff. *Held,* that under section 124 of the Personal Property Law the canal boat was the place of delivery and the captain having pursuant to subdivision 3 of said section acknowledged to defendant that he held the potatoes on defendant's behalf, the defendant by his statement to the captain as to when he would begin taking the potatoes off the boat, assumed dominion over them and was liable for the purchase price.

A letter written by defendant to plaintiff after telling the captain when he would start unloading the boat, in which letter he in no wise repudiated the contract, except that he deferred payment on account until he started to unload the boat, evidenced his assent to become the owner of the potatoes.

The answer alleged that the agreement sued on was for the sale of goods in excess of fifty dollars; that no agreement in writing was ever made and subscribed by defendant; that he did not at the time of the alleged sale accept or receive any part of said goods or at any time pay any part of the purchase price. *Held,* that assuming that the defense of the Statute of Frauds was properly pleaded, a motion for a new trial after a verdict in favor of plaintiff will be denied.

MOTION for new trial after verdict for plaintiff.

Rogers & Sawyer, for plaintiff.

Thomas P. Hall, for defendant.

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NICHOLS, J. The plaintiff is a farmer in Washington county, engaged in the cultivation of seed potatoes which he sold to dealers in New York city. These potatoes were conveyed by canal boats through the barge canal to the Hudson river and thence to the city of New York. In the years 1918 and 1919 the plaintiff sold a boatload of seed potatoes to the defendant, a New York potato dealer. December 13, 1920, plaintiff had a boat loaded with potatoes in charge of Captain Reilly lying in pier 4 or 5, Coenties slip, New York city. On December thirteenth the plaintiff called on the defendant and had some conversation about the sale of his potatoes to the defendant. The offer that the defendant made for the potatoes was not satisfactory, and plaintiff left defendant's office, saying he would look around a little; he returned on the following day and said he would let the defendant have the load of potatoes, which consisted of about 7,600 bushels, of which 333⅓ barrels were "Giants" and the balance were "Peerless." The price for the Giants was $4.62 a barrel, amounting to $1,540, and the Peerless came to $9,584.86, making a total of $11,124.86, which is the price and the amounts defendant agreed to pay. The contract was not in writing, nor was there any earnest money paid that day, the defendant agreeing to pay $3,000 on account January first, following. The plaintiff notified the defendant that the potatoes were in Captain Reilly's canal boat, which was named *The Malinda Reilly*. The defendant told the plaintiff that it would be after Christmas when he would start to take the potatoes off the boat. The plaintiff told the defendant that he would notify the captain of the boat that the defendant would begin on the first boat next to the dock to unload, there being three other canal boat loads of potatoes belonging to other farmers and sold to the defendant, in the same

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slip. On the same day the plaintiff notified Captain Reilly that he had sold the potatoes to the defendant. Captain Reilly was informed by the plaintiff on December thirteenth of the sale of the cargo to the defendant and advised him to call on the defendant in a day or two to find out when he would start the load. Captain Reilly called the defendant on the telephone and the defendant asked him where the boat was; Reilly told him where the boat was and the defendant asked him who had that load, and Reilly told the defendant his (plaintiff's) name and the name of the boat, and the defendant told him he would start the boat Monday or a week from Monday and that he was going to unload the three boats of Henry and Crowley and said: "You will be the fourth boat to be unloaded." Reilly, in that conversation, told the defendant that plaintiff had told him that he had sold the potatoes to defendant to which the defendant replied "Yes." When the defendant notified Captain Reilly that he would start the boat next Monday or the following Monday, Captain Reilly said that would be all right.

December 27, 1920, defendant wrote plaintiff, stating, "I regret that conditions have changed, so that until we start unloading your boat, it will be impossible to send you any funds. I know that you will understand the situation."

On January 12, 1921, the defendant again wrote plaintiff as follows: "Immediately upon opening up Crowley's and Henry's boats, we found these potatoes to show considerable rot and I immediately wrote you that we would not be able to use your load. I regret this very much but in view of the experience we are having with these two loads, we think it best not to attempt to ship anything else."

The defendant's answer sets up the Statute of Frauds as a defense, alleging that the agreement men-

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tioned in the complaint was for the sale of goods in excess of fifty dollars, that no agreement was ever made in writing and subscribed by the defendant; nor did the defendant at the time of the alleged sale accept or receive any part of the said goods or did defendant at any time pay any part of the purchase price.

While there may be some question, from the language of this defense, as to whether the defense of the Statute of Frauds has been pleaded, because there is no requirement in the statute (Pers. Prop. Law, § 85), that the buyer at the time of the alleged sale should accept or receive any part of the said goods; but we will assume for the present that the defense is properly pleaded. By subdivision 3 of section 85 of the Personal Property Law, it is provided: "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." The defendant stated to two or three other potato growers that he had bought this boatload of potatoes from the plaintiff. This beyond any question constituted an acceptance of the load.

By section 124 of the Personal Property Law it is provided that the place of delivery, in the case of a contract of sale of specific goods, which to the knowledge of the parties when the sale was made were in some other place, then that place is the place of delivery. Therefore, the canal boat, *Malinda Reilly,* was the place of delivery. By subdivision 3 of section 124 of the Personal Property Law, it is provided that where the goods at the time of the sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf. Captain Reilly acknowledged to

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the defendant that he held the goods on the defendant's behalf, and the defendant assumed dominion over them, stating to Captain Reilly that he would begin taking the potatoes off the boat either the next Monday or Monday of the week following that. In *Outwater* v. *Dodge*, 6 Wend. 397, the court says: "Thus, if the articles are ponderous, and not easily susceptible of actual delivery, and the vendee proceeds to exercise a right of ownership over them, by disposing of them, or giving orders and directions respecting them, this will justify a jury in finding a delivery and acceptance."

In *Bowe* v. *Ellis*, 3 Misc. Rep. 92, the court says: "Proof of any act or acts from which it may be reasonably inferred that the seller has abandoned possession as owner, and that the purchaser has assumed it, is sufficient evidence of acceptance and receipt to take an oral contract of sale out of the Statute of Frauds, without further proof that the goods were actually transferred from one place to another."

The letter of the defendant of December twenty-seventh was conduct of the defendant showing his assent to becoming the owner of these specific goods; he in no wise repudiates the contract, except that he defers payment on account until he starts the unloading of the boat.

If the defendant's answer is not sufficiently broad to plead the Statute of Frauds as a defense, then, of course, the action would be undefended.

There has crept into this case in some manner not exactly clear to myself, a question of practice. In my charge to the jury, I say: "Now I am going away and I am going to allow you gentlemen to report your verdict to the clerk when you have agreed upon it." To this, no exception was made by either of the parties. After the jury had retired, I then stated to the attor-

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neys: "The verdict may be received by the clerk in session, if you desire. You may take a recess until they come in, and then the clerk may adjourn it to Hudson Falls after the receipt of the verdict." No exception was taken to this by either of the parties. After the rendering of the verdict the defendant's attorney moved as follows: "The defendant moves to set aside the verdict on the ground it is contrary to law, contrary to and against the weight of the evidence, and on all the grounds mentioned in section 999 of the Code," in no wise objecting or excepting to the manner in which the verdict had been received. In *Morris* v. *Harburger,* 100 App. Div. 357, Mr. Justice Hatch, writing for a divided court, where the trial justice at the close of his charge had stated, that as he was about to leave the city, he would authorize the clerk of the court to receive the verdict of the jury, and the parties interposed no objection to this proceeding, the court says: "Were the question an original one, I should hesitate in holding that the parties were not estopped by consenting that the clerk receive and enter the verdict;" but the court reversed the judgment upon the ground that the court could not leave the trial and authorize the clerk to receive the verdict of the jury; that the consent of the parties did not cure such error and could not be delegated by the court to the clerk, even by consent. This doctrine was overthrown by the Court of Appeals in the case of *Dubuc* v. *Lazell, Dalley & Co.,* 182 N. Y. 482, the court holding at page 487: "The absence of the trial judge when the verdict was received was at most an irregularity which the parties could and did waive."

The motion for a new trial must be denied.

Motion denied.

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HARRY SUGARMAN, Respondent, *v.* HARRY FREEMAN, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1921, Term — Filed January, 1922.)

Brokers — real estate broker must disclose purchaser — commissions.

A broker to sell real estate who refuses to reveal to his employer the identity of the proposed purchaser is not entitled to recover commissions.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fourth district, in favor of plaintiff.

Isidore Faitt, for appellant.

John T. Fenlon, for respondent.

GUY, J. Defendant appeals from a judgment in favor of plaintiff in an action brought to recover broker's commissions for producing a purchaser ready, able and willing to buy defendant's property on defendant's terms. The employment is admitted, and the evidence shows that plaintiff obtained, but did not produce, a customer ready, able and willing to buy on defendant's terms. After repeated negotiations resulting in a modification of the terms satisfactory to defendant, the defendant demanded that the broker inform him who the proposed purchaser was. Plaintiff refused to divulge the name of his proposed purchaser.

Plaintiff testified that he offered to bring the proposed purchaser to defendant's office; defendant testified that plaintiff made an appointment to do so but

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did not keep his appointment, and that he received no further communication from plaintiff.

The duty of a broker is not merely the finding of a purchaser who is actually ready, able and willing to purchase on his customer's terms, but to produce him, to bring him into communication with his employer, so that the employer may enter into a contract of sale with the proposed purchaser, and may have an opportunity to determine, particularly where part of the purchase price is to remain on bond and mortgage, whether the proposed purchaser would be financially able to perform his contract, which would include payment of the mortgage when due. The refusal to reveal the identity of the proposed purchaser constituted a failure by plaintiff to perform his contract with his employer. "The general rule is well settled that a broker must act with entire good faith towards his principal, and he is bound to disclose to his principal all facts within his knowledge which are or may be material to the matter in which he is employed, or which might influence the principal in his action; and if he has failed to come up to this standard of duty he cannot recover." *Howard* v. *McCredie,* 198 App. Div. 49; citing *Veasey* v. *Carson,* 177 Mass. 117.

The judgment must be reversed, with thirty dollars costs, and judgment directed in favor of the defendant, with costs in the court below.

GAVEGAN and MULLAN, JJ., concur.

Judgment reversed.

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CHARLES H. STEGMEIER, Claimant, v. THE STATE OF NEW YORK.

Claim No. 16805.

(Court of Claims, January, 1922.)

Claims against state — right of state to improve navigability of its waters paramount — state not liable to riparian owners in absence of negligence — Ellicott creek — claim by owner of bed of stream for consequential damages to dock and warehouse dismissed — Laws of 1809, chap. 45; Laws of 1813, chap. 47; Laws of 1913, chap. 624.

The rights of riparian owners are subject to the paramount right of the state to improve the navigability of its waters, and in the absence of negligence, the state is not liable for consequential damages caused by the lawful exercise of such paramount right.

During the years 1919 and 1920 claimant was the owner of lands running "to the Ellicott Creek, thence westerly along said Creek" and including all the rights of his grantors in and to "the Ellicott Creek adjoining said premises and to the center thereof." On the water-front of this land had been erected a dock and warehouse, which was partially supported by piling driven into the bed of the river. By statute (Laws of 1809, chap. 45; Laws of 1813, chap. 47) the state indicated its control of the waters of Ellicott creek specifically reserving the navigable rights of the public therein and claimant took title with notice thereof. In April, 1919, in pursuance of and in conformity with chapter 624 of the Laws of 1913 work was being performed by a duly authorized contractor, under the supervision of state officers, immediately in front of claimant's premises. The entire work was completed August 14, 1919, and as a result thereof, on April 16, 1920, a portion of the bed of the creek in front of claimant's premises gave way taking with it a portion of his warehouse. Upon the hearing of a claim for damages there was no proof to sustain the contention that claimant's damages were caused by the negligence of the state. *Held,* that as there had been no invasion of claimant's property upon which direct damages could be

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predicated, even though claimant was the owner of the bed of the stream at the point in question, the damage suffered by claimant was merely a consequential injury to his right of wharfage, which by implication of law as well as the reservation specifically expressed in the statutes of 1809 and 1813, he held subject to the paramount rights of the public, and the claim for consequential damages will be dismissed.

CLAIM for damage to warehouse.

Norman D. Fish, for claimant.

Charles D. Newton, Attorney-General (John H. Clogston, Deputy Attorney-General, of counsel, and Patrick H. Clune, Deputy Attorney-General, with him on the brief), for the State of New York.

CORWIN, J. The claimant, during the years 1919 and 1920, was the owner of lands fronting on Ellicott creek in the city of Tonawanda, N. Y., such lands running "to the Ellicott Creek, thence westerly along said Creek" and including all the rights of his grantors in and to "the Ellicott Creek adjoining said premises and to the center thereof." On the water-front of this land had been erected a dock and warehouse, which was partially supported by piling driven into the bed of the river.

Chapter 45 of the Laws of 1809 declared certain designated waters of Ellicott creek, including those in front of the premises of the claimant, to be "a public highway, provided, however, that the owner or owners of the adjoining lands may erect mills or other water-works, storehouses or docks on the said waters, so that the same shall not obstruct the navigation thereof."

Chapter 47 of the Laws of 1813 declared certain designated waters, including those waters of Ellicott creek in front of the premises of the claimant, to be "public highways, except so much of the said waters as may be necessary for the owners of the adjoining

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land to build store-houses and docks, for the accommodation of boats; provided, the same shall not obstruct the navigation of the said waters; and further, the said owners may erect mills or other works on the waters of * * * " (naming a number of creeks, including Ellicott creek) " so as not to obstruct the navigation thereof."

Chapter 624 of the Laws of 1913 authorized the superintendent of public works " to improve that portion of the Ellicott creek between the Erie canal and the city line of the city of Tonawanda by deepening the channel of said creek to such a depth that the bottom of said channel will be on a level with the bottom of the channel of the Erie canal." Said statute further provided that " The work herein provided for shall be done by and under the direction of the superintendent of public works in accordance with plans and specifications to be furnished by the state engineer and surveyor;" and that such work was to be done either by contract entered into by said superintendent or by the forces of the department of public works or partly by both methods in the discretion of the superintendent.

In April, 1919, such work was being performed by a duly authorized contractor, in pursuance of and in conformity with the above-mentioned statute, in that portion of Ellicott creek immediately in front of the claimant's premises, the entire work being completed August 14, 1919. As a result thereof, on April 16, 1920, a portion of the bed of the creek in front of claimant's premises gave way, or as the claimant expressed it, " slid in," taking with it a portion of his warehouse.

For this damage the claimant seeks to be compensated.

We believe it to be the settled rule laid down by both

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the federal courts and the courts of this state that the right of the state to improve the navigability of its waters is paramount, to which the rights of riparian owners are necessarily subject; and that the state is not liable for consequential damages to riparian owners caused by the lawful exercise of that right, in the absence of negligence. *Scranton* v. *Wheeler*, 179 U. S. 141; *Slingerland* v. *International Contracting Co.*, 169 N. Y. 60; *Sage* v. *Mayor*, 154 id. 61; *Lewis Blue Point Oyster Co.* v. *Briggs*, 198 id. 287.

In the case of *Sage* v. *Mayor, supra*, Judge Vann, in delivering the opinion of the court, said: "While we think it is a logical deduction from the decisions in this state that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tidewater for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of preemption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the state, as in the *Langdon* and *Williams* cases. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the state as trustee for the public, there is reserved by implication the right to so improve the waterfront as to aid navigation for the benefit of the general public, without compensation to the riparian owner."

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But it is not necessary to rely upon an implied reservation in the present case. By the early acts of 1809 and 1813, relied upon by the claimant, the state indicated its control of the waters in question, specifically reserving the navigable rights of the public therein, and the claimant took with notice thereof. *People* v. *Canal Appraisers,* 33 N. Y. 461, 467.

It is true that the above discussion by Judge Vann refers to tidal waters; but there is, in this state and in this country, no such distinction between tidal and non-tidal waters as existed at common law. Ellicott creek, while a non-tidal inland stream, is, at the point in question, one of those streams which " are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water;" and is, therefore, a navigable stream. *The Daniel Ball,* 10 Wall. 557; *The Montello,* 20 id. 430; *Morgan* v. *King,* 35 N. Y. 454. Nor does it matter whether the ownership of the bed of the stream is in the claimant or in the state; because, if in the claimant, his title is necessarily subject to the public servitude of navigation. Nichols Em. Dom. § 139; Farnham Waters & Water Rights, § 29; *Scranton* v. *Wheeler, supra,* 163; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53; *Buffalo Pipe Line Co.* v. *N. Y., L. E. & Western R. R. Co.,* 10 Abb. N. C. 107; *Lehigh Valley R. R. Co.* v. *Canal Board,* 146 App. Div. 151, 159; *West Virginia Pulp & Paper Co.* v. *Peck,* 82 Misc. Rep. 76.

Judge Vann notes an exception as to the right to wharfage, when protected by a grant and covenant on the part of the state, in conformity with the rule laid down in *Langdon* v. *Mayor of City of N. Y.,* 93 N. Y. 129, and *Williams* v. *Mayor of N. Y.,* 105 id. 419; but the claimant cannot claim the benefit of this excep-

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tion because he does not bring himself within the rule established by those cases. The grants contended by the claimant to have been acquired by virtue of the acts of 1809 and 1813 were not based upon any consideration, and were, in fact, merely confirmatory of the rights already possessed by claimant's predecessor in title as riparian owner. *Rumsey* v. *New York & New England R. R. Co.*, 133 N. Y. 79. This clearly distinguishes the claimant's case from the *Langdon* and *Williams* cases, as the grants in these latter cases were, in each instance, based upon a valuable consideration, and this fact was a controlling element in those decisions as appears from the discussion by Judge Earl in the former case (pp. 145–149) and the discussion by Judge Finch in the latter case (p. 436).

It is asserted that the claimant has been deprived of his property without just compensation. There has been, in this case, however, no taking of private property for public use within the meaning of the constitution; but merely a consequential injury to claimant's right of wharfage, which right, by reason of the reservation implied by law as well as the reservation specifically expressed in the acts of 1809 and 1813, he held subject to the paramount rights of the public. Nor has there been an invasion of claimant's property upon which direct damages can be predicated, even though he owns the bed of the stream; because his title thereto, if any, as has been shown, is also subject to the easement of the public therein for the purpose of navigation. The damages suffered by claimant were clearly consequential. *Radcliff* v. *Mayor of Brookyn*, 4 N. Y. 195; *Uppington* v. *City of New York*, 165 id. 222.

There is no proof in the case to sustain the claimant's contention that his damages were caused by the negligence of the state. The work was conducted in

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strict accordance with the provisions of chapter 624 of the Laws of 1913 and under the supervision of the state officers named therein. The competency of these has not been questioned. It is true that claimant's engineer testified that the dredging should have been done at a different grade than that actually used; but that was a matter of discretion resting with the state offices charged with the direction of the work, who were responsible for properly carrying out the improvements to navigation contemplated by the act.

It is claimed on behalf of the state that the land upon which the structures in question were erected was appropriated by the state of New York at the time of the building of the Erie canal and that the claimant was, therefore, a trespasser. In the view we have taken of the case, it is unnecessary to pass upon this question. The claim must be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

THE PEOPLE OF THE STATE OF NEW YORK v. SANTO MANFREDONIO, Defendant.

(County Court, Bronx County, January, 1922.)

Crimes — bigamy — one legally married who goes through ceremony with another also lawfully married, is guilty of bigamy.

Where one legally married contracts the second marriage in this state with one who at the time was also lawfully married he is guilty of bigamy under the laws of the state of New York, and where at his arraignment upon an indictment charging him with the crime of bigamy, he pleads guilty, a motion in arrest of judgment will be denied.

MOTION in arrest of judgment.

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Edward J. Glennon, district attorney (George B. DeLuca, assistant district attorney, of counsel), for people.

Samuel Goldstein, for defendant.

GIBBS, J. The defendant was indicted for bigamy. Upon arraignment he pleaded guilty to the indictment and is now awaiting sentence. Counsel for the defendant now calls the court's attention to the fact that while the defendant was lawfully married he contracted a second marriage with one who was also lawfully married. The question now arises whether the defendant is guilty of the crime charged, in view of the fact that the spouse of his second marriage could not have lawfully entered into said marriage. There appear to be no cases in point in the state of New York. There are, however, a number of English cases which hold both ways.

In *Reg.* v. *Fanning,* 10 Cox C. C. 411, it was held that where a man who was a Protestant and legally married and remarried by a Roman Catholic clergyman to a Roman Catholic woman while his wife was still living, having represented himself to the woman as a Roman Catholic, he was not guilty of the crime charged, the reason being that such a marriage was not recognized by the law and, therefore, was a nullity. Judge O'Hagan, dissenting, said, that the word "marry," as used in the second part of the statute, meant the act of going through such a ceremony as, but for the former marriage, would have constituted a valid marriage. This language has been followed in a great many cases in England and in this country. *Reg.* v. *Brawn,* 1 C. & K. 144, and *Reg.* v. *Allen,* 12 Cox C. C. 193.

Wharton on Criminal Law, in section 2020, says as follows: "No defense that bigamous marriage was

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voidable. The offense consisting in entrapping another into marital intercourse on a false plea, it is no defense that the second marriage was void on other grounds than that of bigamy; or where the second marriage was within the prohibited degrees or was prohibited on the ground of difference of race; * * * But an informal or imperfect ceremony, not based on the assent of the parties or followed by cohabitation, will not sustain an indictment."

In the case of *Reg.* v. *Allen, supra,* the defendant, while his second wife was alive, married a niece of his former deceased wife. The last marriage was within the prohibited degrees of affinity and void. It was held that the defendant was guilty of bigamy. The court, commenting on the case of *Reg.* v. *Fanning, supra,* said: "Now, the words 'shall marry another person,' may well be taken to mean shall 'go through the form and ceremony of marriage with another person.' The words are fully capable of being so construed without being forced or strained, and as a narrower construction would have the effect of leaving a portion of the mischief untouched, which it must have been the intention of the Legislature to provide against, and thereby, as is fully admitted by those who contend for it, of bringing a grave reproach on the law, we think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning. To assume that the words must have such a construction as would exclude it because the second marriage must be one which but for the bigamy would have been as binding as the first, appears to us to be begging the entire question, and to be running directly counter to the wholesome canon of construction which prescribes that, where the language will

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admit of it, a statutory enactment shall be so construed as to make the remedy coextensive with the mischief it is intended to prevent."

It is my opinion that the New York state statute should be construed as intending that any person who is legally married and goes through a ceremony of marriage recognized by the law of this state with another person, whether she is able to enter into the marriage contract or not, is guilty of the crime of bigamy.

Motion denied.

In the Matter of the Probate of the Last Will and Testament of JOHN W. DICK, Deceased.

(Surrogate's Court, Bronx County, January, 1922.)

Wills — construction of — upon probate surrogate may determine whether after-born children, unprovided for, are entitled to share — when after-born children deemed to be mentioned in will within meaning of section 26 of Decedent Estate Law.

The surrogate upon a proceeding for the probate of a will has jurisdiction to construe the instrument and adjudicate as to whether after-born children of the testator, unprovided for therein or by any settlement, are entitled to a distributive share of his estate pursuant to section 26 of the Decedent Estate Law.

After the creation of a trust for the benefit of certain named persons and of testator's wife, his executrix, who if after-born children were cut off, was the sole legatee, the will provides: "In the event of my leaving legitimate issue, I annul this entire will and give, bequeath and devise to my wife my entire estate whether the same be real, personal or mixed property, to herself, her heirs, executors and assigns, in fee and absolutely free from any trust or restrictions." *Held,* that said children were mentioned in the will within the meaning of section 26 of the Decedent Estate Law and were not entitled to succeed to any portion of testator's property, pursuant to such statute.

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PROCEEDING for probate of will.

John Kadel, for petitioner.

Herbert A. Knox, special guardian.

SCHULZ, S. In a proceeding for the probate of a will, the special guardian of two children of the decedent born after the execution of the document and surviving the testator, prays for a construction of the will and for a determination as to whether or not his wards are entitled to a distributive share of the decedent's estate pursuant to section 26 of the Decedent Estate Law (Laws of 1909, chap. 18; Consol. Laws, chap. XIII). The will was permitted to go to probate and the question of construction was reserved and is now to be determined.

Proponent's counsel suggests that the court has no jurisdiction to construe the will and cites *Matter of Sauer,* 89 Misc. Rep. 105, as so holding. He states, however, that he is willing that the court proceed to construe the will to the end that the matter be disposed of. It is nevertheless necessary to determine this question for if it be a fact that such jurisdiction is not in this court, it cannot be conferred by the consent or the acquiescence of counsel. *Matter of Heinze,* 179 App. Div. 453; *Matter of Mondshain,* 186 id. 528; *Matter of Thompson,* 184 N. Y. 36; *Matter of Martin,* 211 id. 328, 330.

Decedent Estate Law, section 26, provides that whenever such surviving after-born child is unprovided for by any settlement and neither provided for, nor in any way mentioned in the will, such child shall succeed to the same portion of the parent's estate as would have descended or been distributed to such child if the parent had died intestate " and shall be entitled to recover the same portion from the devisees and

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legatees, in proportion to and out of the parts devised and bequeathed to them by such will." And section 28 of the same law provides that such child "may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; * * *"

In *Matter of Sauer, supra,* a similar proceeding was before the court and the surrogate declined to construe the will holding that the action provided for in the section last cited is a special statutory action which lies in " our general court " and not in the Surrogate's Court and that no court other than that vested with jurisdiction of such actions can determine whether the action lies or not and that the remedy of the after-born child under the circumstances here presented is exclusive and depends wholly on statute. If this is a correct interpretation of the statute, then this proceeding for construction must be dismissed.

Section 28 of the Decedent Estate Law also provides that such child is " subject to the same liabilities, and has the same rights and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed." The section, therefore, appears to give to such child not only a remedy against the legatees and devisees by an action which would not lie in this court, but also the same remedy *to compel a distribution* as has any other person, so entitled to succeed. Such a person could compel an accounting; hence it would appear that an after-born child might compel an accounting.

By section 40 of the Surrogate's Court Act (formerly Code of Civil Procedure, section 2510) the Surrogate's Court is given jurisdiction to administer

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justice in all matters relating to affairs of decedents, and to try and determine all questions, legal or equitable, between the parties as to all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires, and also to determine the validity, construction or effect of any disposition of property contained in any will proved in his court, whenever a special proceeding is brought for that purpose or whenever it is necessary to make such determination as to any will in a proceeding pending before him or whenever any party to a proceeding for probate demands such determination in such proceeding. This latter jurisdiction is further conferred by section 145 of the Surrogate's Court Act (formerly section 2615 of the Code of Civil Procedure), which also authorizes an independent proceeding for that purpose. If an after-born child can compel an accounting and a distribution on such an accounting, it would follow that the court has jurisdiction to construe the will and if it has such jurisdiction it may be exercised in a probate proceeding, in a special proceeding brought for that purpose or upon an accounting.

I have been unable to find any authority directly upon the point in question and none has been drawn to my attention except *Matter of Sauer, supra.* In *Matter of Dwyer,* 192 App. Div. 72, however, involving another section of the same statute, the reasoning is by analogy applicable to the question now to be determined.

In that matter the court had under consideration section 27 of the Decedent Estate Law which provides that if any person shall be a subscribing witness to the execution of any will where any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness and the will

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cannot be proved without the testimony of such witness, the said devise, etc., shall be void so far only as concerns such witness or any claiming under him, and if the witness would have been entitled to share in the testator's estate if the will were not established, then so much of the share that would have descended or been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will " and he shall recover the same of the devisees or legatees named in the will in proportion to, and out of, the parts devised and bequeathed to them."

It will be observed that the language quoted above is almost identical with that part of section 26 of the Decedent Estate Law heretofore quoted.

Section 28 which was under consideration in *Matter of Sauer* refers not only to after-born children but also to a subscribing witness. It would follow, therefore, that if the remedy against the legatees and devisees prayed for in section 28 is exclusive as regards an after-born child, it would also be exclusive as to a subscribing witness, but in the case cited the Appellate Division of the fourth department held that section 27 provides a remedy but that such remedy is not exclusive. The remedy provided by section 27 is incorporated in section 28; hence it would follow that the remedy against the devisees and legatees provided in section 28 is also not exclusive.

I cannot impute to the legislature an intent that the court in which the administration of an estate is pending, which has control of the personal representative of the decedent and which is fully advised of the facts, shall have no jurisdiction to determine the rights of children and direct a distribution under the circumstances referred to, but that such children shall be relegated to an action against the legatees who may pos-

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sibly be nonresidents. It might well be that under such an interpretation of the statute, the surrogate would be compelled to make a distribution knowing it to be contrary to the rights of the children.

Upon the reasoning in the *Dwyer* case and the additional provisions of section 28 of the Decedent Estate Law to which I have referred and which in my opinion give to the infant a right to compel distribution, I reach the conclusion that the court has jurisdiction to construe this will.

The next question to be determined is whether I should construe the will at this time. I am aware of the fact that the general trend of the decisions is that such a construction should not be had, unless it is necessary either to the making of the decree in the matter then pending, or to the administration of the estate, and is usually deferred to the final accounting when the time for distribution arrives.

The proponent is the widow of the decedent, the executrix of his will, and, if the children are cut off thereby, the sole legatee thereunder. It is quite possible that under these circumstances she may not file a final accounting unless I make this necessary by refusing to construe the document at this time. Again, her circumstances may be such that it will be of great importance for her to know whether she can use all the assets of the estate or whether a part thereof belongs to the children, and if the latter have any rights, they should be established so that, as persons interested, they may be heard pending the administration of the estate. The question also involves the status of the children, for, if the executrix made a final accounting and the question were undetermined, she would not know whether they are necessary parties and should be cited or not. All of the parties interested in this matter are now before the court, repre-

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sented by counsel and a special guardian, both of whom have submitted briefs upon the question involved, and there appears to be no reason why a construction cannot be had with full justice to all of the parties interested. Such being the circumstances, I deem it to the best interests of the estate of the decedent that the will be construed at this time.

It is conceded that the testator had no issue living when the will was executed and that the after-born children were unprovided for by any settlement. By his last will and testament he established a trust for the benefit of his wife and others therein named and thereafter he provided as follows: "In the event of my leaving legitimate issue, I annul this entire will and give, bequeath and devise to my wife my entire estate whether the same be real, personal or mixed property, to herself, her heirs, executors and assigns, in fee and absolutely free from any trust or restrictions."

I hold that by the language quoted, the two after-born children were mentioned in such will within the meaning of the statute (*McLean* v. *McLean*, 207 N. Y. 365; *Holbrook* v. *Holbrook*, 193 App. Div. 286) and that, therefore, they are not entitled to succeed to any portion of the testator's property pursuant to the provision of such statute.

Settle decision and decree accordingly.

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In the Matter of the Estate of AUGUSTUS D. JUILLIARD, Deceased.

(Surrogate's Court, Orange County, January, 1922.)

Wills — construction of — testator's intention must govern — when legatee entitled to income up to date of organization of corporation provided for in will — attempted gift to corporation of income which accrued prior to its organization illegal and void.

Where the meaning of a testator is apparent the plain import of the language of his will may not be departed from though it result in rendering the instrument invalid.

It is the duty of the court in the interpretation of a will to ascertain from its language, properly interpreted, what the testator actually intended and then to determine whether intended provisions are valid.

Testator, who died April 25, 1919, devised and bequeathed his residuary estate to his executors in trust, with instructions to organize, as soon after his death as practicable, and within the lifetime of his nephew and of a partner of testator, a corporation to be known as the "Juilliard Musical Foundation" and to transfer and pay over the entire capital of the trust fund to said corporation when organized, for the uses and purposes provided for in its charter. The will contained a further direction that until said corporation was organized, the executors should pay all income actually received from the trust fund to testator's nephew, but that upon such organization being effected, all distribution of income to him should cease, and that there should be no apportionment to him of income partially or wholly earned, but not yet due and payable, at the organization of the "Juilliard Musical Foundation," and in the event that the corporation was not organized or for any other reason the said testamentary provisions should be ineffectual, the entire trust fund and estate was devised and bequeathed to the "American Museum of Natural History" and to "St. John's Guild in the City of New York" in equal shares. The will gave testator's partners the right to purchase his interest

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in the firm, and in certain mill stocks owned by him, "upon the inventory value" and "on an inventory basis" respectively. The executors and trustees and the surviving partners as of the day of the testator's death consummated a sale of testator's interests in the partnership and in the mill stocks. Interest bearing promissory notes of the surviving partners were delivered to and accepted by the executors and trustees in accordance with the direction of the will, except as to interest dates. The "Juilliard Musical Foundation" was incorporated by the legislature March 30, 1920, and a meeting for the purpose of effecting the organization of said "Foundation" was held April 16, 1920. The notes were dated April 25, 1919, and delivered November 23, 1920. Upon the delivery of the notes the surviving partners also gave a check in payment of any and all interest due from them on account of the notes up to and including October 25, 1920, amounting to $965,471.60. Upon the judicial settlement of the accounts of the executors and trustees and for a construction of the will, the substitutionary legatees asserted claims to the amount of said check, together with certain other income from corporate or governmental securities, which accrued prior to the organization of the "Juilliard Musical Foundation." *Held*, that the intent of the testator was to give to his nephew all income that was due and payable up to the date of the organization of the "Foundation" whether actually reduced to possession or not, and that the remainder of said income should go to the "Foundation."

The attempted gift to the corporation of income which accrued prior to its organization constituted a direction for an illegal accumulation of income and was void.

The nephew was entitled to the income on the notes and all other income that was due and payable up to the date of the meeting held for the purpose of effecting the organization of the corporation, and the testator having failed to give and bequeath the balance of said income it passed to his next of kin under the Statute of Distributions, but before a decree can be granted herein the proceeding must be amended so as to bring in such persons.

The fact that the amount received on the sale of testator's interest in the firm and in the mill stocks was less than the inventory value as stated in the transfer tax proceeding conducted by his executors and trustees, does not alter the fact that the price so paid was the agreed inventory value and a compliance with the terms of the will.

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PROCEEDING for the judicial settlement of the account of the executors and trustees and judicial construction of will.

Larkin, Rathbone & Perry (John M. Perry, of counsel), for petitioners.

Rushmore, Bisbee & Stern (Charles E. Rushmore and Emil J. Villanyi, of counsel), for Frederick A. Juilliard.

Davies, Auerbach & Cornell (Edward Cornell, Charles H. Tuttle and Martin A. Schenck, of counsel), for Juilliard Musical Foundation.

Hawkins, Delafield & Longfellow (Lewis L. Delafield and E. J. Dimmock, of counsel), for American Museum of Natural History.

Choate, LaRocque & Mitchell (Richmond Weed and Robert E. Hendrickson, of counsel), for St. John's Guild in the city of New York.

O'Gorman, Battle & Vandiver, for Laura Cornelia Machado.

Frank Lybolt, special guardian.

SMITH, S. Augustus D. Juilliard, a resident of the town of Tuxedo in this county, died on April 25, 1919, leaving a will duly admitted to probate by this court on the 25th day of September, 1919.

The testator's will made many bequests to relatives and charitable corporations and then disposed of the residue as follows:

"*Forty-fifth:* I give, devise and bequeath all of the rest, residue and remainder of my estate of whatever

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kind or nature, including therein all legacies which shall lapse, and all legacies, bequests or other testamentary dispositions which for any reason shall be or become ineffectual or be declared invalid, as follows:—

"(a) Unto my Executors and Trustees hereinafter named. * * * IN TRUST * * *.

"(b) I do hereby direct and instruct my said Executors and Trustees, * * * as soon after my death as may be practicable and within the liftime of my nephew FREDERICK A. JUILLIARD and my partner ROBERT WESTAWAY, and the survivor of them, to incorporate or cause to be incorporated under the general laws of the State of New York or by special Act of the Legislature of the State of New York, a corporation to be known as the 'JUILLIARD MUSICAL FOUNDATION,' which shall have authority, among such other powers as may be conferred upon it, to take and hold property and administer, invest and reinvest the same, and to devote the income therefrom to the objects of said organization, which shall be in general scope as follows: (a) to aid worthy students of music in securing a complete and adequate musical education * * *; (b) to arrange for and to give without profit to it musical entertainments, concerts and recitals of a character appropriate for the education and instruction of the general public in the musical arts; and (c) * * * to aid by gift of part of such income * * * the Metropolitan Opera Company in the City of New York, for the purpose of assisting such organization in the production of operas * * *.

"(c) I do hereby direct my Executors and Trustees hereinafter named * * * upon the organization of said corporation the JUILLIARD MUSICAL FOUNDATION, * * * to transfer and pay over unto the said corporation, the entire capital of the said trust fund created by this section of my Will, marked 'FORTY-

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FIFTH' in order that said corporation may devote the same under the laws of the State of New York, to the uses and purposes that may be provided in the charter as aforesaid. * * *.

"(d) Until the organization of the corporation JUILLIARD MUSICAL FOUNDATION as hereinabove provided (which I trust may be accomplished without any appreciable delay after my death) * * * I direct my said Executors and Trustees under this will to pay over unto said FREDERICK A. JUILLIARD all income that may be actually received from the fund provided to be transferred to said corporation upon its organization, but that upon the oganization of said corporation all distribution of income from said fund unto said Frederick A. Juilliard shall cease, and there shall be no apportionment to him of income partially or wholly earned, but not yet due and payable at the time above stated.

"If for any reason the said corporation shall not be organized * * * or if for any other reason the provisions of this clause shall be ineffectual, then I give, devise and bequeath the entire fund and estate referred to in this section of my will marked 'FORTY-FIFTH' unto the AMERICAN MUSEUM OF NATURAL HISTORY and ST. JOHN'S GUILD IN THE CITY OF NEW YORK in equal amounts."

The testator was a partner in a firm known as A. D. Juilliard & Co., and provided for the disposition of his interest therein as follows:

"*Thirty-ninth.* I authorize and empower my Executors and Trustees * * * to sell my interest in the firm of A. D. Juilliard & Company to my surviving partners for a sum which shall equal the value of my interest therein at the date of my death, the value of which interest shall be determined upon the inventory value of all the property of said firm, including the

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capital invested, stock on hand and bills and accounts receivable, and deducting outstanding bills and accounts payable, but without including any valuation on the good-will of said partnership, my interest in which I give and bequeath to my said surviving partners absolutely, provided they purchase my interest from my said Executors and Trustees as herein provided, and I authorize my Executors to receive in payment for my said interest in said partnership the notes of the surviving members of my said partnership bearing interest at four and one half per cent. (4½%) per annum, and payable one half thereof within five years from the date of my death and the other half within ten years from the date of my death, with the privilege of paying all or any of said notes before maturity. If my said surviving partners shall not, for any reason, purchase my said interest on the terms set out herein, then I direct my said Executors and Trustees to take such proceedings as are necessary to liquidate my interest in said firm as soon after my death as may be practicable, consistent with the character and operations of said firm.

"I also empower my said Executors and Trustees to sell all my interest in or in the securities of any mills in which I may have an interest at the time of my death to my said surviving partners for a sum which shall equal the value of my said interests as ascertained on an inventory basis. And I authorize my Executors to receive in payment for my said interests the notes of the surviving members of my partnership bearing interest at four and one half per cent. (4½%) per annum, and payable one half thereof within five years from the date of my death and the other half thereof within ten years from the date of my death, with the privilege of paying all or any of said notes before maturity. If my said surviving partners shall

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not, for any reason, purchase my said interests on the terms set out herein, then I direct my said Executors and Trustees to sell the same as soon after my death as may be practicable, consistent with the character and operations of said mills or corporations operating the same."

The Juilliard Musical Foundation was incorporated by the legislature of the state of New York (Laws of 1920, chap. 89), on March 30, 1920, and the act provides for the organization of said corporation. The meeting for the purpose of effecting said organization was held on April 16, 1920.

On November 23, 1920, the surviving partners of A. D. Juilliard & Co. delivered to the executors and trustees four promissory notes dated April 25, 1919, as follows:

Note for $2,789,109.65 due April 25, 1924; note for $2,789,109.65 due April 25, 1929, in payment for the mill stocks; and note for $4,362,531.92 due April 25, 1924; note for $4,362,531.92 due April 25, 1929, in payment of the interest of A. D. Juilliard in the partnership, together with their check for $965,471.60 in payment "of any and all interest due from us on account of the said notes up to and including the interest due on October 25th, 1920." These notes provided for the payment of interest at the rate of four and one-half per cent per annum, payable semi-annually on October 25, 1919, April 25, 1920, October 25, 1920, and April 25, 1921, and annually thereafter at said rate. The notes aggregate $14,303,283.14 and amount to $421,011.55 less than the inventory value of said stocks and said partnership interest as fixed for the purpose of assessing the transfer tax due in this estate.

Frederick A. Juilliard, Juilliard Musical Foundation, American Museum of Natural History and St. John's

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Guild in the city of New York assert claims to this sum of $965,471.60 together with certain other income from corporate or governmental securities which accrued prior to the organization of Juilliard Musical Foundation on April 16, 1920, and the executors and trustees ask that the will be construed to determine the distribution of the same.

Frederick A. Juilliard claims that the predominate idea of the testator was to divide all income between himself and Juilliard Musical Foundation; that he unquestionably is entitled to the interest on said notes which fell due on October 25, 1919, on the theory that the direction to pay him "all income that may be actually received from the fund" should be construed to refer to all income that would vest in possession of the trustees whether collected or not — in other words, all income accrued before the organization of the foundation; and that he is, in fact, entitled to all income received on the theory that the clause in respect to apportionment should be construed to mean that there should be no such apportionment *provided* the foundation could take such income but, if it could not take the same, then he should have all of the income up to the date of such organization that the law would not permit the foundation to take and that the provision for non-apportionment should be regarded as eliminated.

Juilliard Musical Foundation claims that the surviving partners of A. D. Juilliard & Co. did not purchase the testator's interest in said firm and in the mill stocks upon the terms set forth in the paragraphs of the will above quoted, *i. e.*, the inventoried value, but, on the contrary negotiated and bargained and finally bought the same for $421,011.55 less than such inventory value; that the notes and check delivered on November 23, 1920, as a matter of fact together con-

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stitute the purchase price of the testator's interest in said partnership and stocks and that such aggregate sum would pass without brand or earmarks to distinguish profits from principal and was, in the hands of the estate, nothing but principal; and, therefore, such entire amount goes to said corporation as " the entire capital of said trust fund " given to said Foundation by the paragraph of the will above quoted.

American Museum of Natural History and St. John's Guild in the city of New York claim that the language of the testator's will precludes Frederick A. Juilliard from any income not actually received; that the legacy to the foundation of such income earned but not received prior to the organization of such corporation fails as involving an unlawful accumulation; and that such income was bequeathed to said substitutionary legatees by the paragraph of the will above granted.

The testator's will, as above quoted, gave his surviving partners the right to purchase his interest in the firm of A. D. Juilliard & Co. and in the mill stocks owned by him "upon the inventory value " and " on an inventory basis," respectively, and the executors and trustees and the surviving partners have consummated a sale of the same, claiming to have acted pursuant to said provision. The fact that the amount received is less than the inventory value as stated in transfer tax proceedings in this estate conducted by the executors and trustees, and not by the surviving partners, does not alter the fact and the price so paid is the agreed inventory value and a compliance with the terms of the will. This transaction was properly consummated as of April 25, 1919, the date of the death of the testator, and the notes so given and accepted were in accordance with his directions, except as to the interest dates, and the determination of such

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small details of the transaction was within the power of the executors and trustees and in accordance with usual business customs.

The intention of the testator, so long as it is not contrary to some statute or to public policy, must govern (*Salter* v. *Drowne,* 205 N. Y. 204) and, where the meaning of the testator is apparent from the language of a will, the plain import of the language cannot be departed from though it result in rendering the will invalid. *Van Nostrand* v. *Moore,* 52 N. Y. 12.

Every presumption against intentional partial intestacy must be favored (*Kelley* v. *Hogan,* 71 App. Div. 343, 347; *Haug* v. *Schumacher,* 50 id. 562, 566, 567; *Matter of Smith,* 46 Misc. Rep. 210; *Schult* v. *Moll,* 132 N. Y. 122; *Byrnes* v. *Baer,* 86 id. 210), but the duty of the court is not to make a new will to carry out some supposed but undisclosed purpose but to ascertain what the testator actually intended by the language employed by him when properly interpreted and then to determine whether such intended provisions are valid or otherwise. The duty of the court is to construe, not to construct. *Herzog* v. *Title Guarantee & Trust Company,* 177 N. Y. 86.

The intent of the testator was to give to Frederick A. Juilliard all income that was due and payable up to the date of the organization of Juilliard Musical Foundation whether or not it had been actually reduced to possession and that the remainder of said income should go to the foundation. The words "all income that may be actually received from the fund" must be read in connection with the remainder of said paragraph which states "upon the organization of said corporation all distribution of income from said fund unto said Frederick A. Juilliard shall cease and there shall be no apportionment to him of income partially or wholly earned but not yet due and payable at

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the time above stated;" in other words, income that was "due and payable" was to go to him whether or not actually reduced to possession prior to that time.

The attempted gift of income as above stated to Juilliard Musical Foundation which accrued prior to its organization constituted a direction for an illegal accumulation of income and was void. *St. John* v. *Andrews Institute,* 191 N. Y. 254.

The claim of American Museum of Natural History and St. John's Guild to this fund cannot be sustained because it is clear from a careful reading of the paragraph of the will above quoted that it is only in the event that the entire residuary bequest in trust shall prove to be ineffectual that they shall take; nor can they take as owners of the next eventual estate. *St. John* v. *Andrews Institute, supra.*

Frederick A. Juilliard is entitled to income on the notes above referred to and all other income that was due and payable up to April 16, 1920, and said Augustus D. Juilliard died intestate as to the balance of said income.

The testator having failed to give and bequeath such income to the person or persons capable of receiving it, such income passes to the next of kin under the Statute of Distributions. *Cochrane* v. *Schell,* 140 N. Y. 516; *U. S. Trust Co.* v. *Soher,* 178 id. 442, 448; *St. John* v. *American Institute, supra.* This fact will make it necessary to amend this proceeding to bring in such persons before the decree can be granted.

Ordered accordingly.

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In the Matter of the Application of MARIAN STEWART HONEYMAN for Revocation of Letters of Guardianship of MARTIN TAYLOR and LEANDER H. LACHANCE.

(Surrogate's Court, Suffolk County, January, 1922.)

Guardian and ward — one of full age by law of her domicile, though a minor by the law of New York, is entitled to receive her property here.

The law of New York that the term of office of a guardian expires when the ward attains the age of twenty-one years only affects a ward domiciled in New York state.

A resident of and of full age — eighteen years — in the state of Illinois is entitled to a decree revoking letters of her guardianship in the state of New York, under the laws of which she is a minor, and requiring the guardian to account for and pay over to her forthwith her property in this state.

APPLICATION for revocation of letters of guardianship.

Robert B. Honeyman, for petitioner.

Platt, Field, Taylor & Patterson, for respondents.

PELLETREAU, S. This is an application of Marian Stewart Honeyman for the revocation of letters of guardianship of her guardians upon two grounds.

First, that she is a resident of Illinois, will be twenty years of age on the 24th of January, 1922, and that under the laws of Illinois she is of full age and entitled to her property.

Second, that the guardians should be removed for mismanagement and unlawful conduct in the performance of their duties.

It appears that Martin Taylor and Leander H. LaChance were appointed general guardians of

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Marian Stewart (now Honeyman) in Suffolk county, N. Y., March 23, 1917. She became eighteen years of age on the 24th day of January, 1920, and in April, 1921, was married to Robert B. Honeyman, Jr. Considerable testimony has been taken as to the place of her residence before and since her marriage. Some of it is conflicting, but this court is of the opinion and definitely concludes that the said Marian Stewart Honeyman has an actual domicile in the state of Illinois and is a *bona fide* resident of that state. Since her marriage her husband became a resident of Illinois, being employed there, and with his wife, hire and occupy an apartment in Chicago in that state. They have no other home. A wife's domicile follows that of her husband. It is to her interest that she reside there, which is some evidence of her intention to reside in that state. The Stewart interests were largely located at Chicago, a considerable portion of her property was and is there and during her minority in that state she had guardians of her estate in the state of Illinois, duly appointed by the Probate Court of Cook county. The place of one's residence is a matter of intention. Since 1872, and perhaps before, females have been of full age when eighteen years of age, in the state of Illinois. The minority of Marian Stewart Honeyman ceased when she became eighteen years of age, under the laws of Illinois.

How does that affect the situation before this court where under the laws of New York minority continues until one is twenty-one years of age, and the term of office of a guardian expires when the infant attains the age of twenty-one years? It would seem reasonable, and the court is of the opinion that this statute only affects a ward domiciled in New York. As affecting a ward residing in another state it would seem on broad grounds that the word " twenty-one "

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means "coming of age" under the laws of the state constituting a residence and domicile of a ward.

As a principle of law a state will recognize and make effective in its courts the legislation of another state. It is a principle of comity which of necessity must exist between the states.

The English rule holds that one of full age by law of his domicile though a minor by law of England is entitled to receive his property in England and give valid receipt therefor.

Is there any question but that a resident of Illinois of full age in that state but a minor under the laws of New York could give a bill of sale for property in New York and that good title would pass under it as against an attack on the ground of infancy in a proceeding brought in this state to collect?

I am of the opinion that the petitioner, as a resident of and of full age in the state of Illinois, is entitled to her property in New York. It is her property. Possession is an incident of a right of property. In my opinion to withhold from the petitioner her property in New York is a clear violation of the property rights of a resident of another state and the constitutional provision guaranteeing property rights. Likewise, it would be a violation of the comity which exists between the states.

I am of the opinion and conclude that the petitioner is entitled to a decree that her guardianship in New York terminated when she became of full age under the laws of Illinois, the state of her domicile, that the letters be revoked as terminated, the guardians account and the funds forthwith be paid to her.

Taking the view as above expressed I do not deem it necessary to pass upon the charges of misconduct made against the guardians, and have not done so.

Decreed accordingly.

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In the Matter of the Application of SUSAN T. SABIN and ANNA J. GOULD, for the Appointment of a Successor Trustee under the Last Will and Testament of SAMUEL J. TILDEN, Deceased.

(Surrogate's Court, Westchester County, January, 1922.)

Surrogates' Courts — practice — filing copy of lost instrument — appointment of administrator with the will annexed denied — successor trustee appointed.

All three executors under a will which created specific trusts died without filing an account of their proceedings. Two of the successor trustees being unable to agree upon the appointment of a third trustee, as authorized by the will, the beneficiaries of the trust filed a petition for the appointment of a third successor trustee as well as for the appointment of an administrator with the will annexed. *Held*, that the answer of one of the successor trustees, who asked leave to file *nunc pro tunc* a copy of a writing signed by one of the deceased trustees, could be used only as an objection to the granting of the letters asked for and not as a basis for the taking of proof and decision thereon, with relation to the granting of letters to a successor executor.

Application for appointment of administrator with the will annexed denied, and a third successor trustee appointed.

APPLICATION for appointment of administrator with the will annexed and successor trustee.

John F. Couts, for petitioners.

John M. Digney (Henry W. Jessup and R. Emmett Digney, of counsel), for respondent.

SLATER, S. The decedent died August 4, 1886, leaving a will which was admitted to probate October 20, 1886, and letters testamentary were duly issued to John Bigelow, George W. Smith and Andrew H. Green,

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all of whom also acted as trustees under said will. All three executors are now deceased. There has never been an accounting by the executors filed in this court. The court is without knowledge as to whether or not there are any unadministered assets. Under the 19th, 20th and 22d paragraphs of said will, certain specific trusts were created for the petitioners herein. In a proceeding brought in the Supreme Court, Honorable Charles F. MacLean, by order dated November 30, 1913, was appointed a trustee in place and stead of John Bigelow, deceased, and, by order dated October 31, 1917, the Supreme Court appointed Charles H. Strong successor trustee of the trust created by the 19th and 20th articles of the will, in favor of the petitioner, Susan T. Sabin. By order dated December 3, 1917, said Strong was also appointed successor trustee to said Randolph under the 22d article of said will in which the petitioner, Anna J. Gould, is beneficiary. George W. Smith, the sole surviving executor of and trustee under said will, died February, 1921, and the two successor trustees have been unable to agree upon the appointment of a third trustee as authorized by the 6th clause of said will. Such disagreement has occasioned the petitioners to make this application for the appointment of a third successor trustee, as well as for the appointment of an administrator *c. t. a.* The respondent, former Justice MacLean, has interposed an answer and, by alternative relief, presents for filing a paper writing (apparently a copy) signed by George W. Smith, appointing him as successor executor in execution of a power of appointment given by the said will. He asks leave to file it *nunc pro tunc.* It appears that the original paper writing cannot be found; assuming that the surrogate has jurisdiction, proof must be made as of a lost document. The court at this time will not decide the question as to its juris-

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diction to take proof of the lost document which purports to name a successor executor, and from which must flow the power of an executor, upon issuance of letters testamentary. It is contended by the respondent that section 117 of the new Practice Act relating to motions and orders (former section 768 of the Code of Civil Procedure) applies in the Surrogate's Court by virtue of section 316 of the Surrogate's Court Act (former section 2770 of the Code of Civil Procedure). The provision of the Surrogate's Court Act regarding certain provisions being made applicable to proceedings in the Surrogate's Court says: "Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of law or of rules, applicable to practice or procedure in the supreme court, applies to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form." Section 49 of the Surrogate's Court Act (former section 2519 of the Code of Civil Procedure) sets forth the kind of pleadings to be used in that court, and says: "All petitions, answers and objections shall contain a plain and concise statement of the facts constituting the claim, objection or defense." In *People ex rel. Lewis* v. *Fowler,* 229 N. Y. 84, it was held that the former sections 870–886 of the Code of Civil Procedure, now sections 288–309 of the Civil Practice Act, were made applicable by section 2770 of the Code of Civil Procedure, now section 316 of the Surrogate's Court Act. These sections relate to the examination of a party for taking a deposition by commission; they relate to a right regarding evidence, not to pleadings.

Former section 768 of the Code of Civil Procedure relates to motions. A motion relates to some incidental question collateral to the main object of the

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action. A motion is not a remedy, but is only connected with and dependent upon the principal remedy. Motions generally relate to matters of proceeding. *Matter of Jetter,* 78 N. Y. 601. General equitable power of this court cannot be examined upon a motion. There is no decision holding that former section 768 of the Code of Civil Procedure applies to the Surrogate's Court. In my opinion, section 2519 provides the exception, and expresses the contrary intent, as stated in section 2770. Therefore, I shall hold that the answer of the respondent may be used only as an objection to the granting of letters *c. t. a.* as asked for by the petitioners and not as a basis for the taking of proof and decision thereon with relation to the granting of letters to a successor executor. Every proceeding in the Surrogate's Court shall be commenced by the filing of a petition. Section 48, Surrogate's Court Act (former section 2518 of the Code of Civil Procedure). An application for letters testamentary is a separate proceeding. *Matter of Mayer,* 144 N. Y. Supp. 438.

The application for letters *c. t. a.* is denied. The relief asked for in the appointment of a successor trustee under said will in execution of the trusts provided for in the 19th, 20th and 22d clauses of said will is granted. The court will appoint a successor trustee of the trusts in the above named articles. An order may be submitted wherein the court will designate such a successor trustee.

Ordered accordingly.

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JAMES J. CROWE, Plaintiff, v. MARSH GARAGE CO., INC., Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, January, 1922.)

Municipal Court of the city of New York — provisions of Civil Practice Act applicable — deposition of party before trial — Civ. Pr. Act, §§ 290, 291.

The Municipal Court of the city of New York is a court of record and the provisions of the Civil Practice Act for the taking of testimony by deposition and the practice thereon as described by said Act are applicable to said court.

Where in an action brought upon oral pleadings in that court to recover broker's commissions, the answer seeks to put in issue every fact necessary for plaintiff to prove in order to establish a cause of action, a motion under section 291 of the Civil Practice Act to vacate a notice given by plaintiff for the taking of the deposition of defendant before trial pursuant to section 290 of said statute will be denied, although plaintiff has filed a bill of particulars.

MOTION to vacate notice.

Cohen Brothers (Guy Hughes Riegel, of counsel), for plaintiff.

Frackman & Robins, for defendant.

LAUER, J. This is a motion to vacate a notice to take the deposition of the defendant before trial given pursuant to section 290 of the Civil Practice Act. The motion to vacate is made pursuant to section 291 of the same act.

I am of the opinion that the provisions of the Civil Practice Act for the taking of testimony by deposition pursuant to section 290 and the practice thereon as it

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is now contained in the Civil Practice Act is applicable to the Municipal Court of the city of New York. The Civil Practice Act by section 1, article 1, provides that "This act shall be known as The Civil Practice Act, and, except as otherwise expressly provided, shall apply to the civil practice *in all the courts of record of the State.*"

The Municipal Court of the city of New York is a court of record. Mun. Ct. Code, § 1.

When the case of *Mitchell* v. *Schroeder,* 94 Misc. Rep. 270, was decided by the Appellate Term and subsequently affirmed by the Appellate Division on the opinion of Mr. Justice Lehman (174 App. Div. 857), subdivision 4 of section 27 of the Municipal Court Code, which was added by chapter 610 of the Laws of 1916 and which conferred the power upon the Municipal Court of taking the deposition of a party to an action, had not been enacted. By subdivision 4 of section 27 of the Municipal Court Code the deposition of a party to an action in the Municipal Court or of a person who expects to be a party to an action about to be brought in that court may be taken at his own expense or at the instance of an adverse party or by a co-plaintiff or co-defendant at any time before or during the trial "*in the same manner as such depositions are taken under the provisions of law applicable to like cases in the supreme court.*" There can be no doubt that, even though effect be given to the case of *Mitchell* v. *Schroeder, supra,* the power to take the deposition of a party having been vested in the Municipal Court by subdivision 4 of section 27 of the Municipal Court Code, the practice and procedure as it prevails in the Supreme Court by express provision of that section is the proper practice to pursue in this court. Such also is the plain intent of the provisions of section 15 of the Municipal Court Code which provides that "except

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as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding." I entertain, therefore, no doubt that the practice pursued in this case is correct.

The pleadings in this case are oral. As appears from the endorsement upon the summons the nature and substance of the cause of action is stated "an action to recover broker's commissions for the sale of defendant's garage at 201 St. Marks avenue, Borough of Brooklyn, N. Y." The defendant's answer as endorsed on the defendant's written notice of appearance filed is "General denial." The defendant thus sought to put in issue every fact necessary for the plaintiff to prove in order to establish his cause of action. The plaintiff's notice which in effect required the defendant to be examined on each one of the issues of the case was quite correct in form and substance.

The defendant I think has not correctly interpreted the purpose of the examination of the defendant before trial in this case when he characterizes it as a fishing excursion, in view of the general denial interposed by it, nor do I think that the plaintiff should be denied the right to examine the defendant before trial in this case because he filed a bill of particulars of his claim in pursuance of the demand of the defendant.

Motion to vacate the notice is denied, with ten dollars costs.

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HARRY S. COWEN and Another, Respondents, v. REGINALD W. PRESSPRICH et al., Appellants.

(Supreme Court, Appellate Term, First Department, February, 1921, Term — Filed January, 1922.)

Bailment — conversion — involuntary bailee exercising dominion over article bailed — stockbrokers liable for delivery to wrong person of bond sent by mistake.

An involuntary bailee, so long as the lack of volition continues, is not in duty bound to care for or guard the subject of the bailment and cannot be held, in respect to custody, for what would even be the grossest negligence in the case of a voluntary bailment.

Where, however, an involuntary bailee does exercise any dominion over the thing so bailed, he becomes as responsible as if he were a voluntary bailee and is absolutely liable in conversion for delivery of the subject of the bailment to the wrong person.

Plaintiffs, a firm of stock exchange brokers, in order to fill an order for the sale and delivery of a fully negotiable bond of a certain railroad company to the defendants who are engaged in the same line of business, ordered the bond from a third bond house which by mistake sent to plaintiffs a bond of another railroad company, which the plaintiffs also by mistake sent to the defendants in the following manner: Said bond and a slip briefly describing a bond of the first railroad company were enclosed in an envelope and taken to defendants' place of business by one of the messenger boys in the employ of plaintiffs, who dropped the envelope into a slot above a closed window of opaque glass, where deliveries were wont to be made and left. Immediately after a member of defendants' firm opened the window and an unidentified boy, not plaintiffs' messenger, stepped up and in answer to the direction to make the statement on the slip agree with the bond, said: "All right," took the bond and left. Upon affirming a judgment in favor of plaintiffs for the conversion of the bond, *held*, that defendants upon the delivery of the bond to them became involuntary bailees thereof and when

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they undertook to re-deliver the same, they acted as greatly at their peril as if they had been voluntary bailees.

Defendants could have protected themselves by telephoning to the plaintiffs that the wrong bond had been delivered or they could have sent the bond back to plaintiffs by one of their own messengers.

Krumsky v. *Loeser*, 37 Misc. Rep. 504, distinguished.

Where an action is tried as one for conversion a judgment in favor of plaintiff can be sustained, if at all, only upon that theory.

Burr, J., concurring in result, Lehman, J., dissenting.

APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of plaintiffs, after trial by the court without a jury.

Winthrop & Stimson (Frederick W. Steele, of counsel), for appellants.

Louis F. Doyle (Warren Bigelow, of counsel), for respondents.

MULLAN, J. Conversion, for the defendants' alleged wrongful delivery of a bond. The parties on both sides are stock-exchange brokers. Plaintiffs had agreed to sell and deliver to defendants a bond of the Oregon Short Line Railroad, of the par value of $1,000. To fill that order plaintiffs ordered the bond from a third bond house and the latter, by mistake, sent plaintiffs an Oregon and California Railroad bond, and plaintiffs, also by mistake, sent this Oregon and California bond to defendants. There is no controversy as to the manner of the sending. Plaintiffs handed the Oregon and California bond to Goldberg, a youth of seventeen years, who was one of plaintiffs' two messengers, or "runners" as they seem to be

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called. With the bond was a memorandum (also called "slip" or "statement") briefly describing an Oregon Short Line bond. The bond and slip were inclosed together in an envelope. Goldberg took the envelope to defendants' place of business in a Wall street office building. Defendants' suite of offices had two entrance doors from the office-building hall, one for general use, and the other for persons, such as Goldberg, making deliveries. Goldberg entered at the latter door, and was then in a tiny outside room, described as about two feet by six feet. There was no door for passage between this small outside room and an inside, and presumably larger, room. Deliveries were made by dropping papers in a slot in one of the partitions partly forming this small outer room. Above the slot was a window, of opaque glass, that swung inwards. That window was kept closed unless or until the person acting for defendants at the delivery window should desire to talk to one making a delivery, when he would open the window. Next to the partition containing that slot and window, and in the inner room, was a desk at which was kept seated either a member of defendants' firm or a clerk. At the time here in question there were two persons at that desk, Mr. Quackenbush, of the defendants' firm, and an employee, one Campbell. Goldberg dropped the envelope through the slot. His testimony was: "I waited until he (the person at the desk) took it in and then I left. * * * I told him I will call back for a check. Q. Why didn't you ask for the receipt? A. Well, I was in a hurry, I had many deliveries that day, and I had to make them. * * * Q. How long would you say you were in that delivery room in front of that delivery window — from the time you put the bond in until you left? A. It was from a minute to a minute and a half." Goldberg could not recall whether the person

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at the other side of the window said anything. He thought, but was not sure, that there was "somebody" else in the little outside room when he was there. It does not appear, from Goldberg's testimony, whether or not the delivery window was open during any part of his stay while making the delivery. Mr. Quackenbush testified as follows: "Q. Will you tell us what took place at the time of that delivery? A. It was about ten-thirty in the morning; Mr. Campbell and myself stood there making up our loans, when a bond shoots through the window like a streak of lightning; it goes right down my desk — that was my desk about the width of this table (indicating stenographer's table) — right down in front of us. As it rolls over, I opened it up, just pulled the bond open that way instantly. [Indicating.] The statement called for an Oregon Short Line five bond; I could see immediately that the bond was an Oregon and California, and we handle thousands of them. Q. What did you do then? A. I immediately opened the window. Q. Where was that, right in front of you? A. Right like that [indicating] and I yelled 'Cowen.' A young man steps right up and I says make your statement agree with the bond. The Court: Sir? The witness: Make your statement agree with the bond. He mumbled, 'all right,' and takes the bond and goes out immediately like that. Q. And he took it? A. He took it. Q. When you say man —? A. A young boy nineteen or twenty years old. Q. What did you do then, close the window? A. Closed the window, went about my work. Q. You were expecting from Cowen and Company at that time a Short Line bond, were you not? A. Yes. We had purchased one, looking for it. Q. You were looking for it? A. Yes, some day. Q. And you say you instantly found it was not —? A. It was not more than fifteen seconds. Q. And you

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were under no contract to purchase from Cowen and Company a California bond? A. No sir. Q. How long would you say it took between the time that bond came into your slot on to your desk and the time you opened the window and yelled Cowen? A. Not a second more than fifteen. Q. Fifteen seconds? A. Not a second more than that. Q. When you opened the window where did the boy come? A. To my left from the main door. Q. You heard the Goldberg boy testify, did you not, that when he put that bond into your window, he waited about a minute and a half, is that correct? A. I will say no. Q. Did you hear him say anything? A. Nothing. Q. The only thing you know is seeing the bond shoot into the window. A. Exactly. Q. Was there a receipt on that bond to be signed by you? A. No sir, it was not. Q. It was merely a sale memorandum? A. Exactly. Q. Neither one of them is the young man to whom you delivered the bond? A. No sir. Q. You delivered the bond to some one else? A. Neither one of those (plaintiffs) boys." Mr. Campbell substantially corroborated Mr. Quackenbush's version.

Concededly, the boy to whom Quackenbush returned the bond delivered by Goldberg was not Goldberg, but some unidentified boy who made away with the bond. The bond was of the bearer type, fully negotiable.

The defendants have refused to make good the plaintiffs' loss, contending that they were chargeable only with due diligence, and that, accepting the version of the plaintiffs as given by Goldberg, it appears that they exercised all the care required of them. The plaintiffs contend that there was an absolute obligation on the part of the defendants to redeliver the bond to the plaintiffs, and that no question of negligence enters into the case. They also argue that if the negligence question does enter, there was sufficient evidence

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to warrant a finding that the defendants did not, in fact, exercise due care. The learned trial judge did not state the ground of his decision in plaintiffs' favor.

A person who has been put, through no act or fault of his own, in such a situation as that in which the defendants were put upon the delivery to them of the wrong bond, has come to be known as "involuntary bailee" (1 Halsbury Laws of Eng. 528; *Heugh* v. *L. & N. W. R. R. Co.*, L. R. 5 Ex. 51 (1870); 5 Cyc. 166, n. 27; Story Bailm. [7th ed.] §§ 44a, 83a), or bailee by casualty (*T. J. Moss Tie Co.* v. *Kreilich*, 80 Mo. App. 304) or constructive or *quasi* bailee (Schouler Bailm. [3d ed.] ¶ 3).

In the field of voluntary bailments, whether they be for hire or be otherwise coupled with an interest on the part of the bailee, or whether they be merely gratuitous, no rule is better settled than that it is the duty of the bailee to deliver the bailed article to the right person, and that delivery to the wrong person is not capable of being excused by any possible showing of care or good faith or innocence. *Willard* v. *Bridge*, 4 Barb. 361; *Hawkins* v. *Hoffman*, 6 Hill, 586; *Esmay* v. *Fanning*, 9 Barb. 176; *Packard* v. *Getman*, 4 Wend. 613; *Carroll* v. *Mix*, 51 Barb. 212; *Coykendall* v. *Eaton*, 55 id. 188; *McEntee* v. *N. J. Steamboat Co.*, 45 N. Y. 34; *Price* v. *Oswego & Syracuse Ry. Co.*, 50 id. 213; *Bank of Oswego* v. *Doyle*, 91 id. 32; *Ouderkirk* v. *Central National Bank of Troy*, 119 id. 263; *Sonn* v. *Smith*, 57 App. Div. 372; *McKillop* v. *Reich*, 76 id. 334; *Cohen* v. *Koster*, 133 id. 570; *Hassan* v. *Platt*, 163 id. 366; *Stewart* v. *Frazier*, 5 Ala. 114; *Lichtenhein* v. *Boston & Providence Railroad Co.*, 11 Cush. 70; *Hall* v. *Boston & Worcester Railroad Co.*, 14 Allen, 439; *Jenkins* v. *Bacon*, 111 Mass. 373; *Jones* v. *Dowle*, 9 M. & W. 19; 6 C. J. 1143; 27 Eng. R. Cas. 252, 253; 1 Halsbury Laws of Eng. 527.

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Such distinctions as have been drawn between the duties of voluntary bailees for compensation, and voluntary gratuitous bailees, relate solely to the degree of care the bailee should exercise in respect of the *custody* of the thing bailed. In respect of *delivery* to the proper person, no such distinction is drawn; the duty in both cases is absolute.

What, then, is the difference, if any, between the duty of a voluntary gratuitous bailee, and that of a wholly involuntary bailee? There is an astonishing paucity of decision and text opinion upon the subject. I think, however, that all that can be found upon it points to the conclusion that the involuntary bailee, as long as his lack of volition continues, is not under the slightest duty to care for or guard the subject of the bailment, and cannot be held, in respect of custody, for what would even be the grossest negligence in the case of a voluntary bailment (1 Halsbury Laws of Eng. 527, 528; *Howard* v. *Ellis,* 1 Cab. & El. 253; *Smith* v. *Nashua & Lowell Railroad Co.,* 27 N. H. 86); but that in case the involuntary bailee shall exercise any dominion over the thing so bailed, he becomes as responsible as if he were a voluntary bailee. 1 Halsbury, 528, ¶ 1078; Story Bailm. (7th ed.) §§ 85–88; *Smith* v. *N. & L. R. R. Co., supra; T. J. Moss Tie Co.* v. *Kreilich,* 80 Mo. App. 304; *Hiort* v. *Bott,* L. R. 9 Ex. 86.

In *Hiort* v. *Bott, supra,* the plaintiff shipped barley to defendant, at the same time sending to defendant an invoice stating that the barley was ordered by defendant through G., described in the invoice as a broker acting for both parties, and with the invoice was a "delivery order" that made the barley deliverable to the order of "consignor or consignee." The defendant had not ordered the barley, and had never had any dealings with either the plaintiff or G. A few

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days later G. called upon defendant, informed defendant that the shipment to him was made by mistake, and asked defendant to indorse the delivery order to him, G. The defendant complied, and G., concededly an impostor, obtained the barley and absconded. It was held that as the defendant by reason of his affirmative act exercised dominion over the barley, thus causing a misdelivery, he was liable in conversion as matter of law. The defendant there relied largely upon an earlier case in the Exchequer, *Heugh* v. *L. & N. W. R. R. Co.*, L. R. 5 Ex. 51 (1870). In the *Heugh* case the plaintiff shipped goods upon the supposed order of a concern that had in fact gone out of business, the order having been forged by one Nurse, a former employee of the consignee. The defendant carrier tendered the goods at the stated address of the consignee, and acceptance was refused by the persons who had succeeded to the possession of the premises. The carrier then mailed an "advice note" to the consignee, at the same address, asking for instructions. Nurse shortly thereafter called upon the carrier, with the advice note, and the carrier turned the goods over to him. It was held that the defendant carrier, described by Kelly, C. B., as an "involuntary bailee," was not under an absolute duty to deliver to the proper person, but that it was properly a question for the jury whether the carrier had "exercised reasonable and proper care." One of the barons, Channell, said that "some American cases" were cited in support of the proposition that the delivery to Nurse amounted in law to a conversion, but that they failed to satisfy him that any greater duty was cast upon the carrier than to exercise reasonable care. It may be said, in passing, that the decision in the *Heugh* case is directly opposed to the doctrine of the American cases. In *Price* v.

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Oswego & Syracuse R. R. Co., 50 N. Y. 213, 221, the doctrine of the *Heugh* case was expressly disapproved, and in *Jenkins* v. *Bacon*, 111 Mass. 373, it was said that "if the case of *Heugh* v. *London & North Western Railway Co.*, L. R. 5 Ex. 51, can be said to present a case of delivery to the wrong person, (which is open to considerable doubt,) the doctrine there asserted is directly opposed to the above-cited decisions of this court."

The distinction sought to be made by the judges in the *Hiort* case to escape the holding in the *Heugh* case is so far from clear to me that I shall not attempt to state it.

In *T. J. Moss Tie Co.* v. *Kreilich*, 80 Mo. App. 304, the organizers of a railroad company, which never became an accomplished fact, purchased a right of way with reversion to the grantor in case the road was not constructed. Prior to the abandonment of the project, railway ties were placed upon the land so purchased. After abandonment, the reversioner refused to give the ties up. It was held that he was held to an absolute liability to give them up to the true owner, and that the only question in the case was as to who that owner was.

In *Krumsky* v. *Loeser*, 37 Misc. Rep. 504, the facts, as stated by Mr. Justice Greenbaum in his opinion, were as follows: "The plaintiff is a manufacturer of ladies' wrappers. The defendants are the proprietors of a large department store in Brooklyn. The parties had never had business relations with each other. On April 19, 1901, two swindlers purporting to represent the defendants ordered a bill of goods of the plaintiff, with directions to deliver them to the defendants' place of business. The plaintiff, after satisfying himself of the financial ability of defendants, as he asserts, sent the goods

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to the defendants by an expressman. It appears that the defendants' establishment is in the habit of receiving about 350 packages from various houses daily and that the goods were received under the assumption that they had been ordered by the defendants. Later in the day the man in charge of the receiving department of the defendants was called upon the telephone by a person who represented himself to be the plaintiff and who stated that the case of wrappers had been delivered to the defendants by mistake and that the goods would be called for. Shortly after this conversation a person called with an order, purporting to be signed by plaintiff, addressed to the defendants, requesting the redelivery of the case to bearer. The order explained that the mistake was occasioned by wrongly addressing the goods to the defendants instead of 'E. Losier, Savannah, Ga.,' and expressed the hope that the defendants had not been inconvenienced. The goods were thereupon handed over to the bearer of the order. It subsequently transpired that the plaintiff and the defendants were the victims of a swindle and the question is presented as to which of the parties must bear the loss of the goods." The opinion then proceeds: "The plaintiff attempts to fasten a liability upon the defendants as gratuitous bailees upon the theory of the defendants' negligence in accepting the goods and delivering them up to a stranger. Were defendants bailees? A bailment must be predicated upon some contractual relations, express or implied, upon the delivery of the goods, between the bailor and bailee. In this case the goods were by trick, the result of a fraud practiced upon plaintiff, thrust upon the defendants, who thus for a short time were, unconsciously and unknowingly, the custodians of the plaintiff's goods. Where one becomes possessed of another's goods by chance or

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accident, no bailment obligation will arise unless the possessor is aware and has knowledge of the fact that goods have come into his possession which belong to another. In the case at bar, the knowledge that the defendants became possessed of the goods not belonging to them was communicated to them by the swindler to enable him to carry out his scheme of obtaining the property of the plaintiff. If I am apprised by another that a certain article belonging to him has been sent to me by mistake, am I not justified in assuming, from the very fact of such party first making me aware of its possession, that he is the true owner and entitled to its return? Am I obligated or beholden to the real owner, if I have been deceived, to account for the value of the article thus secured from me through trick? I think not. If, however, by any process of reasoning, the duty of a gratuitous bailee could be fastened upon the defendants, then I am of the opinion that, inasmuch as they would only be chargeable in that case with gross negligence (*First National Bank* v. *Ocean National Bank*, 60 N. Y. 278), they should not be here held liable. They were certainly no more negligent than was the plaintiff in parting with his goods. The defendants, indeed, acted in the matter as any ordinarily prudent man could have been expected to act under the circumstances."

I am of the opinion that the *Krumsky* case is clearly distinguishable from that at bar. As I read the opinion there, the holding of the court was predicated upon two considerations, neither of which touches the instant case, namely, that the possession of the defendants there was due to a trick and a fraud and defendants' total lack of knowledge of the true owner. As to the effect of fraud, there is support to be found for the *Krumsky* decision in *Metzger* v. *Franklin Bank*, 119 Ind. 359 (and see Schouler Bailm. [3d

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ed.] 72), but there was analogous fraud in the *Hiort* case, and in *Duff* v. *Budd,* 3 Brod. & B. 177, and in *Price* v. *Oswego & Syracuse R. R. Co.,* 50 N. Y. 213, and numerous other of the cases I have cited, and not only do the decisions in those cases, holding the defendants to an absolute liability, negative the materiality of the fraud consideration, but in the *Price* case that very point is discussed and rejected.

As to the effect of the total lack of knowledge on the part of the bailee concerning the identity of the bailor, the decision in the *Krumsky* case does, however, find strong support in the case of *Morris* v. *Third Ave. R. R. Co.,* 1 Daly, 202. There a satchel was found in a street car by the conductor. No one knew how it got there. Presumably, it was unintentionally left behind by some passenger. The conductor brought it, at the end of his run, to the railroad office. A few minutes later an impostor called for the satchel and, upon testimony which the trial and appellate courts held warranted a finding that there was an inadequate description by the impostor of the contents of the satchel, the railroad officials delivered the satchel to the impostor. The ruling was that the defendant's duty was merely to exercise reasonable care. I think it is possible to agree that the case was correctly decided, without admitting that the decision touches the instant case, or that it was rested upon entirely correct principles. The court there described the defendant carrier as a bailee for hire at the time of its delivery over of the satchel. Had that been so, clearly the duty of the defendant to deliver to the right person was absolute. But, although the court fell into that undoubted error, I am inclined to think it reached the right conclusion, and upon the proper ground, viz., that because the defendant carrier did not have any reason to know who the true

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owner was, nothing more could have been required of it than to exercise due care to see to it that the satchel should come into the hands of the true owner.

I have reached the conclusion that while, at first blush, it may seem to be imposing upon the defendants an unduly severe rule of conduct to hold them to an absolute liability, the rule is no more severe than the occasion calls for. The exchequer judges in the *Hiort* case were reluctant to hold the defendant there to the rule of absolute liability, but they were, nevertheless, unanimous in doing so; and I think the rule worked more harshly there than it would here. There, the parties never had any relations with each other. Here, the plaintiffs were at least attempting to fill an order given by the defendants. The defendants could easily have protected themselves by telephoning the plaintiffs that the wrong bond had been delivered, or they could have sent the bond back to the plaintiffs by one of their own messengers. Instead, they chose to take the chance of delivering it to the wrong messenger. As the delivery window was closed when the bond was dropped through the slot, and remained closed for an appreciable time, they could not have known what messenger had made the delivery.

As was said by one of the judges in the *Hiort* case, many ingenious supposititious cases might be suggested involving erroneous deliveries of parcels at one's home or business place, but, as was there observed, "probably the safest way of dealing with (any such case) is to wait until it arises."

The plaintiffs, as has already been mentioned, urge that if the defendants are not to be held in conversion they are, at least, liable in negligence. The action, however, was brought in conversion, and both sides insist that it was tried as a conversion action. The judgment, therefore, may only be sustained, if at all, upon that theory.

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Since writing the foregoing, I have had the benefit of the opinion of Mr. Justice Lehman, in which, with characteristically cogent reasoning, my learned brother supports the view that there was no such exercise of dominion on defendants' part as to make applicable the rule of absolute obligation. I am not at all sure that, if the matter were wholly of first impression, I would not be inclined to agree with him; and, certainly, no one would justly criticize our higher courts if they should adopt Mr. Justice Lehman's view, and make it the basis of the rule of conduct it leads to. We shall permit an appeal, if the defeated party should so desire. In law, the most important of all things is that there be established rules that are well understood. I am holding as I do for the reason that while at present there is very little law upon the subject, I am of the opinion that such authority as I have been able to find seems to force the conclusion that when the defendants undertook to redeliver the bond they acted as greatly at their peril as if they had been voluntary bailees.

For the reasons stated, I vote to affirm.

Judgment affirmed, with twenty-five dollars costs, with leave to defendants to appeal to the Appellate Division.

BURR, J. (concurring). I concur in the conclusion reached by Mr. Justice Mullan and vote to affirm. I believe that defendants having received the bond and taken it into their possession became liable even as gratuitous or involuntary bailees for its proper re-delivery to the true owner.

LEHMAN, J. (dissenting). I agree in all material particulars with the statement of facts contained in

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the opinion of Mr. Justice Mullan. In effect the record shows that through an innocent mistake the plaintiffs delivered by messenger at defendants' office, through the slot in a window intended for the delivery of securities purchased by the defendants, a bond which the defendants had not purchased and that the defendants promptly discovered the mistake and endeavored to return the bond to the plaintiffs' messenger but, by innocent mistake on their part, actually handed the bond to a stranger instead of the plaintiffs' messenger.

Thereafter the plaintiffs made a formal demand upon the defendants for the return of the bond, but at that time the bond was of course no longer in their possession and they could not comply with the demand. The plaintiffs thereupon brought this action alleging in the complaint that on June tenth they were under contract to deliver to the defendants a $1,000 bond of the Oregon Short Line Railroad Company and that they delivered to the defendants a "certain bond" which they believed to be a bond of the Oregon Short Line Railroad for the purpose of complying with their contract. That subsequently they were informed that the bond was a $1,000 bond of the Oregon and California Railroad Company, and the defendants refused to accept said bond as a compliance with their contract for a bond of the Oregon Short Line Railroad. That, "by reason of the premises the plaintiffs are entitled to the return of the said bond of the Oregon and California Railroad Company and have duly demanded the same from the defendants but defendants have wrongfully neglected and refused to deliver same to plaintiffs."

It is unnecessary now to consider whether the complaint sufficiently sets forth any cause of action, for no motion was made by the defendants to dismiss the

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complaint on the ground of insufficiency and no such point is raised on this appeal. It is to be noted, however, that the complaint does not allege any negligence on the part of the defendants and I agree with Mr. Justice Mullan that no such issue was litigated and that the judgment can be sustained only if, as a matter of law, the defendants' mistake in returning the bond to the wrong messenger constituted a conversion of the bond or at least a breach of an implied agreement on their part to return the bond only to the plaintiffs.

While the slot in the window constituted an invitation to deliver at that place securities intended for the defendants, it is evident that it constituted an invitation only to deliver securities which the defendants were under some obligation to receive. Obviously no person could by slipping in other securities impose upon the defendants without their consent any affirmative obligation to care for these securities, to pay for them or even to receive them. The plaintiffs never intended to deliver to the defendants an Oregon and California Railroad bond. By their mistake the plaintiffs divested themselves of possession of the bond, but they did not transfer to the defendants either title or right to possession if they demanded the return of the bond. The defendants had not consented to accept the bond as a deposit; they claimed no title to it and they were not subject to any trust or obligation as bailees, for a bailment arises only through an express or implied contract. They were put in possession of the bond without any agreement on their part, express or implied, to accept the deposit of the bond; and though persons who come into possession of the property of others without their consent are sometimes for convenience called "involuntary" or "quasi-bailees," they incur no responsibility to the true owner in respect thereof. It is only where they com-

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mit some " overt act " of interference with the property that an implied contract of bailment is created. 1 Halsbury's Laws of England, § 1078.

It can hardly be contended, however, that every " overt act " of interference with the property creates an implied obligation of bailment. Undoubtedly an " involuntary bailee " need not abandon the property, but he may, without incurring further liability, at least take steps to preserve and care for the property. As stated by Mr. Justice Mullan it is only in case the involuntary bailee shall exercise *any dominion* over the thing so bailed that he becomes as responsible as if he were a voluntary bailee. The exercise of dominion, as I understand it, necessarily involves some act inconsistent with the complete right of dominion of the real owner, at least to the extent that it would be wrongful unless performed by some person to whom the owner had transferred the right to possession. In other words, an implied contract of bailment with its consequent obligations arises only where a person in possession of the property of another does some act which is inconsistent with the view that he does not *accept* the possession which has been thrust upon him.

The " overt act " which it is claimed constituted an improper interference with or act of dominion over the plaintiffs' property consists of a delivery of the bond to a stranger who had no title to it. If the defendants had attempted to transfer to this stranger any title or right of possession of their own, then of course they could not claim that they had never accepted possession of the bond as bailees. They would then be on the horns of a dilemma, for they would have either denied the right of the true owner and thereby converted the property to their own use or would have exercised a right which was theirs only if they accepted the deposit of the bond left with them.

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In the case of *Hiort* v. *Bott,* L. R. 9 Exch. 86, relied on for authority by Mr. Justice Mullan, the defendant had in fact attempted to transfer to a stranger his own ostensible title to the goods and he had no actual title unless he first accepted an attempted delivery of the goods by the true owner to himself. The defendant in that case had not received the barley into his possession but had received merely a delivery order which made the barley deliverable "to the order of consignor or consignee" and as pointed out by Bramwell, B., "if the defendant had done nothing at all it would have been delivered to the plaintiffs." In the language of Cleasby, B., "He had no duty to perform in relation to the goods, and was a mere stranger, except that by mistake he had been made consignee, and so had an ostensible title, and could dispose of the goods." Knowing that the ostensible title was vested in him only by mistake the defendant was induced by fraud to indorse the delivery order and thereby transfer to a third party the ostensible title to the barley.

The defendant could not indorse the delivery order unless he had title to the barley either in his own right or as agent for the true owner. He did not claim title in his own right, and if he had done so knowing that the ostensible title had been transferred to him only by mistake, such act would in itself have constituted a conversion. His act was lawful, therefore, only if he had accepted title as an agent. The fraud of the alleged broker induced him to believe that he had authority as agent of the true owner to transfer title, but he voluntarily assumed to act as agent of the owner and to accept title as such agent. By voluntarily doing an act which would be lawful only if he accepted title either in his own right or as agent of the owner, he was not in a position to say that possession of the property was thrust on him without his

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consent. He did in fact accept the title as agent of the owner and he then was bound to transfer the title only in accordance with authority actually given by the owner, and no mistake however innocent can avail an agent as an excuse for any other delivery.

It seems to me quite clear that this was the real ground of the decision in the case of *Hiort* v. *Bott, supra,* and the facts in the case before us are so clearly distinguishable that it can in no wise be regarded as an authority for the contention of these plaintiffs, and in fact the reasoning of the opinions rendered in that case supports the contention of the defendants herein. In the present case the defendants were put in possession of the bond by mistake; they discovered the mistake promptly and thereafter they committed no "overt act" of interference with the bond except that they attempted to divest themselves of this possession by delivering the bond to a person whom they believed to be the messenger of the plaintiffs. That act was not only consistent with the continued title and right of dominion in the plaintiffs but was an honest attempt to restore possession to the true owners. It certainly cannot be contended that the defendants were bound at their peril to wait until the plaintiffs came to their office and physically took away their property; they could take proper steps to divest themselves of the possession thrust upon them by mistake without thereby impliedly agreeing, contrary to their clear intention, to accept possession as bailees with the consequent obligations flowing from such relation. It is quite immaterial whether we call these defendants bailees or not if we keep in mind the fact that the possession of these goods was thrust upon them by mistake of the plaintiffs and without their invitation or consent, and that, therefore, any liability for failure to return the goods to the true owner upon demand

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must be the result of some act voluntarily done by the defendants thereafter. An attempt to return the bond to the true owner or to the person who delivered it cannot be considered as inconsistent with a recognition of the complete ownership and right of dominion by the true owner and certainly shows no intent to accept the possession thrust upon the defendants by plaintiffs' mistake and I fail to see how, in the absence of such elements, any implied contract of bailment can arise. If in making an attempt to return the goods, which was lawful and proper in itself, the defendants used means which were not reasonable and proper and as a result thereof the goods were lost or misdelivered, then the defendants would be liable for negligence or possibly for conversion, for every man is responsible for his own acts; but if the defendants had a right to divest themselves of possession and attempt to return the goods, then in the absence of some obligation resting upon contract to deliver the goods only to the true owner or upon his order, I do not see how the mere fact that through innocent mistake the defendants handed the bond to the wrong messenger could constitute a conversion. The defendants could not properly disregard entirely the mistake in the delivery of the bonds. Common courtesy and prudence if not the law, certainly placed upon them the duty to take some steps by which the plaintiffs would be apprised of their mistake and enabled to regain their property. The defendants might have placed the bond in a safe and telephoned to the plaintiffs to call for the bond, but they were under the impression that the messenger who delivered the bond was still present and they gave the bond to him as a means of carrying out their evident duty to apprise the plaintiffs of their error and revest possession in them. The first course might have been the more prudent but as stated by

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Cleasby, B., in his opinion in *Hiort* v. *Bott, supra,* " In such cases " (*i. e.,* in cases where a so-called involuntary bailee has received property into his possession for a purpose which cannot, as afterwards appears, be exactly carried into effect) " the bailee has a duty to perform in relation to the goods, and he is placed in a difficulty in the discharge of that duty by the default of the plaintiff, who ought not to be allowed to complain if, under that difficulty, the bailee has acted in a manner which is considered reasonable and proper."

I have examined the other cases cited in the briefs or in Mr. Justice Mullan's opinion but I have found no case which is in any way inconsistent with these views. It would serve no purpose to analyze them separately for in every case it very clearly appears that where a party has been held liable for failure to return goods to the true owner on demand one of the following elements appeared: 1, the defendant had accepted the deposit of the goods and was therefore under a contractual obligation to return them on demand; or 2, the goods were still in the possession of the defendant when the demand was made; or 3, the defendant had done some voluntary act consistent only with the view that he claimed some property in the goods either as owner or agent of the owner. In all such cases, upon well established principles, the person in possession of the goods is bound to return the goods to the true owner on demand and a previous delivery to a third person even by innocent mistake cannot constitute any excuse or defense for a failure to comply with his obligation. Liability in law must in all cases be founded either on contract or on some wrongful act. The defendants in this case promptly evinced their intention not to accept the possession of the bond thrust upon them by mistake; they merely attempted to divest themselves of this possession, and certainly

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from such attempt no agreement to accept this possession can be implied. Until that time the defendants were under no obligation either to accept the bond as bailees or return it upon demand to the true owners unless at the time of the demand the bond was still in their possession; and it seems to me anomalous and illogical to say that an absolute obligation to return the bond to the plaintiffs and not to deliver it to any other person arises merely from the fact that the defendants did by mistake and through an honest disclaimer of any title or right of possession in the bond, physically deliver it to another. They claimed no title and no right to possession in the bond; they attempted to transfer no title or right of possession of their own in the bond; they had physical possession of the bond through plaintiffs' mistake and they transferred nothing but this physical possession. The plaintiffs could not compel them to retain physical possession, and their act of transferring physical possession even to a stranger under these circumstances shows no exercise of any dominion over the property, for it constitutes no denial of the complete and sole right of dominion in the plaintiffs. In my opinion plaintiffs have, therefore, no right of action against the defendants unless the means which the defendants used to rid themselves of their possession were not reasonable and proper.

While no case has been cited which is exactly parallel to the present case, it seems to me that in several cases in the courts of this state these considerations have been assumed, even if not expressly stated. The case of *Cohen* v. *Koster*, 133 App. Div. 570, is very easily distinguishable from the present case, but there was in that case a delivery of plaintiff's goods in defendant's possession, by the defendant to a thief and both the prevailing and the dissenting opinion

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seem to me to assume that if the defendant had not knowingly accepted possession of these goods under an implied contract of bailment, he was not liable. The case of *Krumsky* v. *Loeser*, 37 Misc. Rep. 504, seems to me more directly in point and I think the decision is necessarily based upon the same view of the law of bailments as I have taken. I cannot see that there is any possible distinction in principle in regard to the obligations arising from possession which has been thrust upon the defendant either by fraud practiced on the true owner or by mistake of the true owner. While that case may perhaps logically be distinguished from the present case in that there the defendant did not know the true owner and was induced to *give up possession* of the goods to a thief through fraud, yet in my opinion these circumstances do not logically affect the rule that a person in possession of goods without his consent is not liable for conversion merely because he delivers them to a stranger in an attempt to revest possession in the true owner, though they may affect the question of the defendant's negligence and whether he has acted reasonably and properly, but only these questions. I do not think that it is worth while to discuss the case of *Morris* v. *Third Avenue R. R. Co.*, 1 Daly, 202. Regardless of whether it was decided correctly or not upon its peculiar facts, it certainly assumes that where possession of goods is thrust upon a so-called bailee without his consent, the " bailee " is not liable for a delivery to a stranger made without negligence and with intent to deliver to the true owner. I cannot see that except in regard to the question of negligence there is any logical distinction in regard to the effect of delivery to a stranger, where the owner is known and where he is not known. In each case the holder has assumed to revest possession in the true owner

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and by mistake has delivered it to a stranger, and in neither case has he assumed any right of his own to dispose of the goods, and thereby exercised dominion over them; but in both cases the question still always remains whether the holder in so acting was free from negligence.

Even if under these pleadings we could consider the question of negligence, I find no evidence upon this question to sustain a judgment in favor of the plaintiffs. There is no doubt that the defendants acted in good faith and in the honest belief that they were handing back the bond to the messenger who delivered it. They had assumed no obligation of any kind to the plaintiffs; any act they performed was for the plaintiffs' benefit and it was through plaintiffs' mistake that they were called upon to act at all in the premises. Doubtless if they had foreseen the possibility of mistake they would not have delivered the bond to the wrong messenger; but it was not unreasonable to suppose that the messenger might be waiting or that if he had left, no thief would be in the office who would claim to represent the plaintiffs. They probably committed an error of judgment but for such error they cannot be held liable. Since they owed no obligation to the plaintiffs and acted in good faith under the reasonable belief that they were returning the bond to the messenger who delivered it, I see no ground for imposing upon them liability for the loss of a bond which would never have been lost but for the plaintiffs' mistake, due apparently to the plaintiffs' negligence.

The contention of the plaintiffs that under sections 129 and 131 of the Personal Property Law the defendants are liable for the price of the Oregon Short Line Railroad Company bond which they had agreed to purchase from the plaintiffs because they failed to return

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to the plaintiffs the Oregon and California Railroad Company bond delivered in attempted compliance with the contract between the parties seems to require no detailed consideration. Even if the Personal Property Law applies to the sale of a bond, these sections would not be applicable to the facts in this case for the evidence shows that the plaintiffs delivered the bond by mistake and without any intent to pass title to the bond in compliance with their contract and that the defendants did not " retain " the bond but, on the contrary, promptly divested themselves of its possession.

For these reasons it seems to me that the judgment should be reversed, with costs, and the complaint dismissed, with costs.

Judgment affirmed, with twenty-five dollars costs, with leave to defendants to appeal to the Appellate Division.

GUIDE REALTY COMPANY, Respondent, *v.* NATHAN BLOOM, Appellant.

(Supreme Court, Appellate Term, First Department, December, 1921, Term — Filed January, 1922.)

Landlord and tenant — New York city — emergency rent laws — date of delivery of lease governs — case at issue when bill of particulars filed — practice — motion for jury trial — right of tenant to bill of particulars and to jury trial when demanded in time.

Whether a lease comes within the scope of the emergency laws depends upon the date of the delivery of the instrument.

Where in an action for rent the answer pleads the statutory defense that the rent demanded is unjust and unreasonable the case is not deemed at issue until plaintiff has filed the statutory bill of particulars.

The defendant in a Municipal Court action for rent by inadvertence neglected to demand a jury trial within three

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days after the service of the answer. By the service of an amended answer the date of the joinder of issue was changed. A motion to compel plaintiff to file and serve the statutory bill of particulars was denied on the theory that it was not required. After unsuccessful efforts on the part of defendant to obtain a jury trial judgment was rendered as the result of a trial by the court alone. Upon reversing the judgment and ordering a new trial, *held,* that defendant's demand for a jury trial was timely and his motion to direct the filing of the bill of particulars will be granted.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of the plaintiff, also from order of same court denying defendant's motion for a bill of particulars.

Benjamin I. Shiverts (Milton Elias Schattman and I. Maurice Wormser, of counsel), for appellant.

Winthrop & Stimson (John M. Bovey, of counsel), for respondent.

GUY, J. The pleadings in this action stated the nature and substance of the cause of action and defense, the indorsement on the summons being "February and March 1921, rent of apartment B on the tenth floor of the premises 801 West End Avenue in the borough of Manhattan, City of New York, under written lease between parties hereto, dated March 16, 1920," and the tenant answering "general denial. Rent is unjust, unreasonable and oppressive," and subsequently filing, by leave of the court, a formal unverified answer setting up the Statute of Frauds in addition to what was contained in the original answer.

Within three days after service of the original answer the tenant, apparently by inadvertence, neglected to demand a jury trial, and after unsuccessful efforts to obtain a jury the case was finally called for trial and against his objection tried by the court

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without a jury and judgment entered against him, defendant not offering any proofs. The tenant also moved that plaintiff be required to file and serve the statutory bill of particulars, but his application in that regard was denied apparently on the theory that the action was not one in which such a bill of particulars was required.

The action being for rent on a lease, and the defendant having set up the defense that the rent was unjust, unreasonable and oppressive he was entitled under chapter 136 of the Laws of 1920 to the statutory bill of particulars. Respondent claims that because in the statement of the cause of action the lease is said to be dated March 16, 1920 (two weeks before the statute referred to went into effect) defendant was not entitled to avail himself of the statutory defense, and accordingly the bill of particulars was properly denied. As far as the complaint is concerned the lease might or might not come within the scope of the emergency laws; whether it did or not depends upon the date of the delivery of the instrument (*Kramer* v. *Borgenicht*, 188 N. Y. Supp. 477; *176 W. 87 St. Corp.* v. *Fleischmann*, 117 Misc. Rep. 316), and as the statutory defense was interposed the case was one "Where the answer contains the defense mentioned in section one of this act" (Laws of 1920, chap. 136, § 2, as amd. by Laws of 1920, chap. 944), and plaintiff was, therefore, required to file the bill of particulars. Moreover, it is further provided by section 2 of the same statute (Laws of 1920, chap. 944) that "Issue shall not be deemed joined until the filing of such bill of particulars," and as under section 118, subdivision 1, of the Municipal Court Code "either party at the time of pleading or within three days after joinder of issue may demand a trial by jury," by reason of the plaintiff's refusal to file the bill, issue was never joined and

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defendant's rights were unimpaired. If there be any doubt on this point, however, the service of an amended answer changed the date of joinder of issue, and his application for a jury was timely and should have been granted.

Having seasonably demanded a jury trial and judgment having gone against him as the result of a trial by the court alone, upon the facts stated the judgment against defendant cannot be upheld.

Judgment and order reversed and a new trial ordered, with thirty dollars costs to the appellant to abide the event, and motion to direct plaintiff to file a bill of particulars granted.

GAVEGAN and MULLAN, JJ., concur.

Ordered accordingly.

MORRIS PAPARO et al., Respondents, *v.* JOSHUA S. SHULMAN, Appellant.

(Supreme Court, Appellate Term, First Department, January, 1922.)

City Court of New York — practice — commercial calendar — breach of contract to manufacture — when consolidation of actions will not be ordered.

The answer in an action brought in the City Court of New York to recover damages for breach of contract upon allegations that defendant improperly manufactured certain shirts, admitted the agreement, denied the other allegations of the complaint, but pleaded no counterclaim. The answer in an action subsequently brought in the City Court by the defendant in the first action against the plaintiffs therein for the manufacture, sale and delivery of the same shirts, denied most of the material allegations of the complaint and set up two counterclaims; one identical with the cause of action set forth in the first action and the other for additional damages and allow-

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ances. The second action having been duly placed upon the commercial calendar and entitled to a preference may be promptly reached for trial, whereas the first action may not be tried for over a year. *Held*, that an order for the consolidation of both actions entered upon granting a motion by plaintiffs in the first action and directing that the second action be stricken from the calendar, will be reversed, the motion denied, and the case restored to the commercial calendar.

APPEAL by defendant from an order of the City Court of the city of New York, consolidating a certain action brought by the defendant herein against the plaintiffs in said action with the above entitled action, and ordering that said action by defendant against the plaintiffs be stricken from the commercial calendar of said court.

Abraham P. Wilkes, for appellant.

Nathaniel H. Kramer (Ira J. Schuster, of counsel), for respondents.

LYDON, J. The plaintiffs commenced an action in the City Court on August 5, 1921, to recover damages for breach of contract, alleging that defendant improperly manufactured certain shirts. Defendant duly answered admitting the agreement but denied the other allegations of the complaint. The answer contains no counterclaim of any kind.

About a month after this action was commenced the defendant above named brought an independent action in the City Court against the plaintiffs for manufacture, sale and delivery of the shirts in question. In this second action the plaintiffs herein interposed an answer denying most of the material allegations of the complaint and setting up two counterclaims. The first counterclaim is identical with the

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cause of action set forth in the complaint in the first action, and the second counterclaim is for additional damages and allowances. The said second action was duly placed upon the commercial calendar of the City Court, under the rules of the said court, whereby it was entitled to a preference, being for labor, and goods sold and delivered. This second action would, therefore, be promptly reached for trial, whereas the first action for damages could not be reached for over a year. The plaintiffs herein brought on a motion in the City Court to consolidate the two actions, said motion was granted, and the order entered thereon directed that the second action be stricken from the commercial calendar.

I think the order should not have been granted because the rights of both parties could have been determined promptly and completely in an earlier trial, which would have been had in the second action, whereas this order does nothing more than delay the determination of the rights of the parties for one year, and I think that the defendant herein has been deprived of a substantial right, in that he was denied a speedy trial. *Miller* v. *Baillard,* 124 App. Div. 555, 557. In these days of commercial uncertainty when business failures are in the ascendency, it behooves a party litigant to expeditiously reduce his claim to judgment, and the courts must assist litigants to get their respective claims determined as promptly as possible.

Order reversed, with ten dollars costs, and motion denied with ten dollars costs, and the case restored to the commercial calendar.

BIJUR and MCCOOK, JJ., concur.

Ordered accordingly.

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JACOB STEINLEGER, Appellant, v. HERBERT FRANKEL and FANNIE FRANKEL, Respondents.

(Supreme Court, Appellate Term, First Department, January, 1922.)

Bill of particulars — discretionary order under section 247 of Civil Practice Act — negligence action — plaintiff on premises at invitation of tenants injured by fall of plaster from ceiling in hallway.

Where in an action to recover for injuries caused by the fall upon plaintiff of a large piece of plaster or other substance from the ceiling in one of the hallways of premises upon which, at the time, as alleged in the complaint, he was lawfully, at the invitation of one of the tenants of the premises, the granting of an order for a bill of particulars as to the age and residence of plaintiff, the name of the tenant whom plaintiff claims he was visiting at the time of the accident, and the size of the piece of plaster which plaintiff claims fell and struck him, is discretionary under section 247 of the Civil Practice Act.

The order granted herein was not an abuse of discretion, and is affirmed, but without costs to either party.

APPEAL by plaintiff from part of an order of the City Court of the city of New York granting defendants' motion for a bill of particulars.

Kornbluth & Pollack (Herman C. Pollack, of counsel), for appellant.

Phillips, Jaffe & Jaffe (Harold M. Phillips, of counsel), for respondents.

BIJUR, J. The action is brought against parties in control of premises to recover damages for personal injuries alleged to have been suffered by plaintiff by reason of the falling of a "large piece of plaster or

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other substance from the ceiling in one of the hallways thereof." It is alleged in the complaint that plaintiff was at the time of the accident lawfully on the premises "at the invitation of one of the tenants thereof."

A motion for a bill of particulars embracing nineteen items was granted. Appellant complains only of the following items: (1) the age of the plaintiff; (2) the residence of the plaintiff; (4) the name of the tenant whom the plaintiff claims he was visiting at the time of the alleged accident; and (6) the size of the piece of plaster which the plaintiff claims fell and struck him. Appellant urges that it is "not the office of a bill of particulars to furnish the evidence but to amplify a pleading and to limit the proof," and that the items complained of are outside of its scope. He suggests also that since failure to comply warrants an order precluding proof of the particulars refused, plaintiff should be required to give particulars only of those facts which he must prove upon the trial.

Plaintiff's contentions are in the main sound and might even be extended. The function of a bill of particulars has been defined to be "an amplification of the pleading" (*Dwight* v. *Germania Life Ins. Co.*, 84 N. Y. 493, 506) and "to limit" generalities (*Gee* v. *Chase Mfg. Co.*, 12 Hun, 630). Its purpose is also described in *Slingerland* v. *Corwin*, 105 App. Div. 310, 311, as "to amplify the pleadings and to indicate with more particularity than is ordinarily required in a formal plea the nature of the claim made, in order that surprise upon the trial may be avoided." The latter point is emphasized in the *Dwight* case at page 503, where the court says that the object of the bill is "to reach exact justice between the parties, by learning just what is the truth, and to learn what is the truth, by giving to each party all reasonable opportunity to produce his own proofs and to meet and sift those of

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his adversary." It has also been said, "It is not the purpose of a bill of particulars to compel a party to furnish to his adversary the evidence upon which he relies." *Smidt* v. *Bailey*, 132 App. Div. 177. But since the bill is by the very words of the statute to set forth "particulars of the claim" of either party, it must necessarily contain a statement of some facts. "Of course a bill of particulars may not be required for the purpose of disclosing the evidence or names of witnesses of an adversary, but it will be required for the purpose of giving definite information as to a claim or proposition contended for by an adversary *with respect to any material fact at issue.*" *Taylor* v. *Security Mutual Life Ins. Co.*, 73 App. Div. 319, 323. See, also, *Bjork* v. *Post & McCord*, 125 App. Div. 813. That a statement of facts is necessarily involved is further exemplified by those cases like *Chittenden* v. *San Domingo Improvement Co.*, 132 App. Div. 169, and *Hill* v. *Bloomingdale*, 136 id. 651, which authorize an examination before trial even of adverse parties or witnesses solely in order to enable the other party to furnish certain of the "particulars." Since, therefore, the plaintiff is required to give particulars of his claim with respect to facts at issue, it follows that what he must give involves at least some reference to facts even though in the form of what we call a statement of ultimate rather than of evidentiary facts. In seeking, however, to distinguish between these two classes, between ultimate facts and evidentiary facts, we are met by that same question of degree which has been so often commented upon by Mr. Justice Holmes, and of which in a notable passage he writes, "It may be said that the difference is only one of degree: *most differences are* when nicely analyzed." *Rideout* v. *Knox*, 148 Mass. 368, 372.

On the other hand, the bill of particulars referred

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to in our system of practice really covers two remedies, (1) the "copy of the account" sued upon which must be furnished as a matter of right (under the first sentences of section 531 of the Code of Civil Procedure, now Civil Practice Act, section 246), and (2) the particulars of a party's "claim" in actions other than upon an account, the direction to furnish which *is discretionary* with the court (under the last sentence of that section, now Civil Practice Act, section 247). See *Badger* v. *Gilroy*, 21 Misc. Rep. 466; *People* v. *McClellan*, 191 N. Y. 341; *Board of Trustees* v. *Hurlburt*, 161 N. Y. Supp. 436. The instant case falls within the latter category.

It seems to me that under the more liberal practice which it has been sought to introduce by the new Civil Practice Act and the accompanying rules, an appellate court should be slow to reverse the discretion of a judge below in respect to items in a bill of particulars unless that discretion has been abused. An abuse of discretion, however, does not occur merely because the lower court has come to a conclusion different from what might have been arrived at in the first instance by individual members of the appellate tribunal. If the alleged error appealed from involved a disregard of some positive fixed rule of law the error would be a mistake of law and not an abuse of discretion. The distinction is often a nice one. "A proper balance between strict rule and magisterial discretion is one of the most difficult problems of the science of the law." Roscoe Pound, "Criminal Practice in the American City," The Survey, Oct. 29, 1921. In discussing a somewhat similar distinction in legislative powers, Prof. Wigmore has said of Justice Holmes: "He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the

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reasonableness of its wisdom." 29 Harvard Law Review, 686.

Nevertheless, in many instances, and surely in the one at bar, the line is not difficult to draw. The question then remains, has the judge below abused his discretion? I take it that there has been no such abuse unless some substantial right of the unsuccessful party has been prejudiced or some remedy impeded or at least some serious inconvenience caused to him. It is clear in the instant case that by supplying the particulars directed in the order appealed from the plaintiff's rights and remedies will be in no way affected and that he will be subjected to none of those unfavorable features such as unnecessary disclosure of personal or business affairs which constitute an important consideration in matters of this kind. On the whole, therefore, I cannot see that any judicially cognizable wrong is predicable of the exercise of his discretion by the judge below. Nor do I think that the plaintiff need fear an order of preclusion in respect of the matters complained of. An order of preclusion need not, and should not, follow merely as matter of course, particularly not when the party ordered to furnish the bill has acted in good faith. "The court will not ordinarily, however, preclude a party from giving evidence if satisfied that the party has in good faith furnished such particulars as he could furnish in pursuance of the order." Smith, P. J., in *Richards* v. *Miller*, 167 App. Div. 443; *Prym* v. *Peck & Mack Co.*, 136 id. 566; *Smith* v. *Bradstreet Co.*, 134 id. 567.

While, therefore, it appears to me that some of the items granted below have little if any substantial value in connection with the "claim" of plaintiff or the ability of either side to develop its case on the trial, the age of the plaintiff may have some relation to the question of the extent of his injuries; and the

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name of the person whom he claims to have been visiting may assist the defendant in ascertaining the lawfulness of plaintiff's presence on the premises. There appears to be little value or purpose in requiring the plaintiff to state the size of the piece of plaster which struck him, particularly as the complaint describes it as a large piece; but on the other hand, there can be no harm in requiring the plaintiff to state its dimensions approximately if he be able, and if not the order permits him to disclose his inability. The address of the plaintiff seems to be wholly immaterial to the function of a bill of particulars; it should properly be ascertained by a motion directed particularly to that end. *Matter of Malcom,* 129 App. Div. 226, and cases there cited. It would, however, be only a waste of time of court and counsel to require an additional motion to be made solely for so simple and harmless a purpose.

On the whole, therefore, although as intimated above, it is possible that had the matter been presented to me as an original application I might have declined to grant some or all of the items complained of, two of them seem to be quite appropriate to a bill, all are quite harmless to the plaintiff and none wholly immaterial to the issue. Under such circumstances I am of the opinion that due regard for the exercise of discretion by the judge below justifies an affirmance of the order, but without costs.

LYDON and MCCOOK, JJ., concur.

Order affirmed, without costs to either party.

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STONEWARE ELECTRIC STOVE WORKS, Appellant, *v.* WILLIAM M. BARRETT, as President of the Adams Express Company, etc., Respondent.

(Supreme Court, Appellate Term, First Department, January, 1922.)

Municipal Court of the city of New York — calendar practice — failure to give notice of order transferring cause to day calendar as required by rule 33 of said court — motion to vacate voidable judgment under section 6(7) of the Municipal Court Code — third party order in supplementary proceedings based on said judgment reversed — Municipal Court Code, § 129(2) does not apply.

After a case in the Municipal Court of the city of New York had been placed on the "reserved generally" calendar, a motion by plaintiff to restore it to the trial calendar was granted by an indorsement of the justice on the motion papers, but no formal order was entered and no notice of the so-called order was served on defendant's attorney. Thereafter, without defendant's knowledge, judgment was entered against him upon an inquest, and more than a year later a transcript of said judgment was filed in the office of the county clerk. A motion by defendant to set aside and vacate the judgment as void was denied, on the ground that, under section 129(2) of the Municipal Court Code, it was made too late. After a motion by defendant for a stay had been denied for want of power, plaintiff obtained a third party order for the examination in supplementary proceedings of a bank. Upon reversing an order granting defendant's motion, made on an order to show cause why the third party order should not be vacated, *held*, that the case was improperly on the calendar of the Municipal Court.

Defendant not having been served with notice of the entry of the order or direction of the justice transferring the cause from the "reserved generally" calendar to the "day calendar" as required by rule 33 of the Municipal Court, the court should not have permitted the inquest or entered judgment as upon a default.

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The failure of plaintiff to submit proof of compliance with said rule 33 made the judgment entered voidable, and defendant's motion to vacate it should have been granted under section 6(7) of the Municipal Court Code.

Section 129(2) of the Municipal Court Code, which relates only to the opening of defaults, did not apply, and the court below has ample power to grant a reargument of the motion to vacate the judgment or defendant, upon new papers showing what has transpired since the entry of said judgment, may renew the motion to vacate it.

APPEAL by plaintiff from an order made at Special Term of the City Court of the city of New York, vacating an order for the examination of a third party in supplementary proceedings instituted by the plaintiff against the defendant.

Kamen & Ostertag (Sol. S. Ostertag, of counsel), for appellant.

Stockton & Stockton (George M. Billings, of counsel), for respondent.

LYDON, J. The action was brought in the Municipal Court, issue joined, and the case placed on the "reserved generally" calendar. Later on, plaintiff's attorneys served a notice of motion on defendant's attorneys to restore the case to the trial calendar. No opposition was made by defendant and on default the motion was granted. No formal order was made or entered, but the justice indorsed on the motion papers, "Motion to restore is granted on default and the case is set for April 9, 1920, F. J. C., Jr." No notice of entry of this so-called order was served on defendant's attorneys. Thereafter without defendant's knowledge, an inquest was taken and a judgment entered. Nothing was done by plaintiff for over one year when, on April 20, 1921, a transcript of the judg-

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ment was filed in the county clerk's office. Defendant then learned of the judgment and promptly moved in the Municipal Court to vacate and set aside the judgment on the ground that it was void. This motion was denied on the ground that the motion was made too late, as over one year had elapsed. Mun. Ct. Code, § 129, subd. 2. Defendant then moved for a stay, and this motion was denied upon the ground that the court had no power to stay the said judgment. Plaintiff then obtained an order in the City Court for the examination in supplementary proceedings of the bank, a third party, and defendant obtained an order to show cause why said examination order should not be vacated. That motion was granted on the ground that the judgment was void, and the order entered thereon is the order now before this court for review. I think the case in the Municipal Court was improperly on the calendar. *Garrison* v. *Barrett,* 176 N. Y. Supp. 19; *United States Fidelity & Guaranty Co.* v. *Liberty Cloak Co.,* 185 id. 278.

The defendant not having been served with notice of entry of the order or direction of the justice of the Municipal Court transferring the case from the "reserved generally" calendar to the "day calendar" as required by rule 33 of the Municipal Court Rules, the court should not have permitted the inquest or entered the judgment as upon a default. The failure of the plaintiff to submit proof of compliance with this rule makes the judgment entered upon the irregular proceedings of the attorney voidable. The motion made by the defendant to "vacate the judgment" should have been granted under subdivision 7 of section 6 of the Municipal Court Code, which provides that the Municipal Court has jurisdiction "to *vacate,* amend, correct or modify any process, mandate, judgment, order or final order, *in furtherance of justice, for* any error in form or *substance,*"

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The Municipal Court justice was in error in denying the motion to "vacate the judgment," and in giving as his reason the prohibition contained in section 129, subdivision 2, Municipal Court Code. There is nothing in section 129 which overrides the provisions of section 6, subdivision 7, nor does the limitation of one year in section 129, subdivision 2, have any effect upon the vacating of a judgment under section 6, subdivision 7. Section 129, subdivision 2, has relation only to the opening of *defaults* and distinctly provides: "A motion to open a *default* * * * must be made with due diligence and upon good cause shown and in no event more than a year after the entry of judgment * * *." It will be readily seen that this subdivision has reference only to opening defaults, which by the moving papers are admitted, and the relief which follows the opening of a default is to vacate the judgment. The defendant by failing to appear on the trial day was not guilty of any neglect, or omission of legal requirement which is the case when a party is in default. In the instant case there was no default, and none of the provisions of section 129 of the Municipal Court Code apply. The judgment, however, was not a nullity, and it was error for the court below to so regard it. The Municipal Court has ample power to grant to the defendant a reargument of the motion heretofore denied, or the defendant may apply upon new papers showing what has transpired since the entry of the alleged judgment.

The order appealed from must, therefore, be reversed and the defendant has his remedy as indicated in this opinion.

Order reversed, without costs, and motion denied.

BIJUR and MCCOOK, JJ., concur.

Order reversed.

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LUIS PRIETO, Plaintiff, v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, Defendant.

(Supreme Court, Kings Special Term, January, 1922.)

Maritime law — actions by seamen for injuries — act of congress approved June 5, 1920 — "the court of the district" means a federal court — seaman may not reject statutory provision as to jurisdiction of court if he accepts benefits of statute — dismissal of complaint in state court.

The words "the court of the district" in the act of congress, approved June 5, 1920, which practically has modified certain principles of the maritime law theretofore applicable to actions by seamen for maritime torts and injuries, are apt to designate a district court of the United States but are insufficiently descriptive to be regarded as referring to state courts.

While said act of congress provides that a seaman who has suffered personal injury in the course of his employment may bring an action for damages and that in such action all federal statutes modifying or extending the common law remedy in cases of personal injury to railway employees, shall apply, a seaman may not accept the benefits of said act of congress and reject the accompanying provision that jurisdiction in such an action shall be under the court of the district in which the defendant's employer resides or in which his principal office is located.

Where, therefore, such an action was brought in the Supreme Court of this state against the United States Shipping Board Emergency Fleet Corporation, a motion to dismiss the complaint on the ground that the court has not jurisdiction of the subject matter, will be granted.

ACTION to recover damages for personal injuries. MOTION for dismissal of complaint on ground that court has no jurisdiction of subject matter.

Edgar J. Treacy, for plaintiff.

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Wallace E. J. Collins, United States attorney (James A. Hatch, of counsel), appearing specially for the purpose of this motion only.

DIKE, J. The defendant, United States Shipping Board Emergency Fleet Corporation, appears specially herein for the purpose of moving to dismiss the complaint on the ground that this court has not jurisdiction of the subject matter.

The action is to recover damages for injuries sustained by the plaintiff, a seaman, in the course of his employment, upon a vessel alleged to be owned or leased, or operated and controlled by the defendant. The complaint alleges that the injuries were occasioned by the negligence of the defendant and its officers and other seamen in the control and operation of the vessel and in failing to maintain the vessel and its appliances in a safe and seaworthy condition. The action is brought under the act of June 5, 1920. Barnes Federal Code, Supp. of 1921, § 7568. This act provides that a seaman who has suffered personal injury in the course of his employment may, at his election, maintain an action at law for damages and that in such action "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply;" and that "Jurisdiction in such actions shall be under the *court of the district* in which the defendant employer resides or in which his principal office is located." Prior to this act, it had been decided that members of the crew of a vessel, except perhaps the master, were fellow servants and that a seaman, suing for a maritime tort or injury, arising from the negligence of the master or any member of the crew, was not entitled to recover an indemnity or consequential damages but only his

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wages and the cost of maintenance and cure; but for an injury resulting from the unseaworthiness of the vessel or its appliances, he was entitled to recover full indemnity. While such an action was maintainable in the courts of common law, it did not thereby become a common-law action. The plaintiff was without power to elect to substitute the principles of the common law for those of the maritime law. On the contrary, by bringing the action in the state court the plaintiff was deemed simply to have elected to enforce his maritime rights through the medium of a common law tribunal, but the essential characteristics of the maritime law, including the rules relating to the acts of fellow servants, to contributory negligence, to assumption of risks, and the measure of recovery, were controlling and governed in the trial of the action. *The Osceola,* 189 U. S. 158; *Chelentis* v. *Luckenbach S. S. Co.,* 247 id. 372; *Kennedy* v. *Cunard S. S. Co.,* 197 App. Div. 459. The Federal Employers Liability Act (Barnes Federal Code, §§ 8069, 8071, 8072) effects radical changes in the common-law rules relating to fellow servants, contributory negligence and assumption of risks. These changes diminish the efficacy of the defenses theretofore available to the defendant in actions brought by railway employees for personal injuries. The provisions, which effect these changes, now inure to the benefit of a seaman who elects to proceed under the act of June 5, 1920. Practically, by this act, congress has modified certain principles of the maritime law theretofore applicable to actions by seamen for maritime torts and injuries. But the seaman may not accept the benefits of the act and reject the accompanying jurisdictional provision. The words "*the court of the district*" are apt to designate a district court of the United States but are insufficiently

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descriptive to be regarded as referring to state courts. In the Federal Employers Liability Act (Barnes Federal Code, § 8074) there is an express provision that "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States * * *." This provision is here important only as it may emphasize the absence of a similar provision in the act of June 5, 1920. It indicates that where congress has desired the jurisdiction of the federal and state courts to be concurrent, that intent has not been left to doubtful inference but has found expression in language of unequivocal import. The hardship upon the plaintiff in this case is obvious. The organization of the United States Shipping Board Emergency Fleet Corporation was an outgrowth of the late war. It is fair to assume that the situation will not be a permanent one. The reasoning of Mr. Justice Hotchkiss in *Nox* v. *U. S. Shipping Board,* N. Y. L. J., Jan. 3, 1922, seems to me to be convincing.

Motion granted.

THE EMIGRANT INDUSTRIAL SAVINGS BANK, Plaintiff, *v.* JAMES E. FOYE et al., Defendants.

(Supreme Court, New York Trial Term, January, 1922.)

Savings banks — deposit of proceeds of a larceny belongs to owner of stolen property.

F., one of the defendants, a clerk in the hotel at which defendant M. resided, and in charge of the delivery and receipt of valuables of guests for deposit in the vaults of the hotel, sold jewelry belonging to M. and the next day under an *alias* deposited with the plaintiff bank, not the amount received for the jewelry but a substantial sum the acquisition of which was not explained. In an action to determine the

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ownership of the deposit which was claimed by various defendants, *held*, that it was a reasonable deduction that the fund in bank was a part of the proceeds of the larceny and should go to the defendant M.

SUIT to determine ownership of savings bank deposit claimed by various defendants.

E. J. Gorman, for plaintiff.

J. H. Logan, for defendant Foye.

McAVOY, J. The defendant Foye deposited a sum of money in plaintiff bank, which defendant Millheiser asserts is the proceeds of a larceny from her of certain jewelry. The events from which such an inference may be drawn are: Defendant Foye was a clerk in the hotel at which Mrs. Millheiser resided. He was in charge of the delivery and receipt of valuables deposited in that hotel's vaults by its guests. Jewelry identified as that of defendant Millheiser was sold by defendant Foye on December 17, 1919, and the deposit here was made by Foye on December 18, 1919, in a sum not of the amount received for the jewelry, but of a substantial sum, the acquisition of which is not explained. The fund was deposited under the alias Barclay Wharton, by Foye, which of itself indicates an endeavor to conceal his identity as a depositor, and raises a likelihood of the unlawful acquirement of the fund. While there must be an identity of the proceeds received from the larcenous taking and the moneys deposited, in order that the defendant Millheiser may be awarded this bank deposit, nevertheless, if it may reasonably be deduced from all the circumstances that the fund was created through the sale of the goods purloined it may be followed into whosoever's hands it may come. To decide that the fund is

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not directly traced from its receipt as the proceeds of the sale of the jewelry to the actual deposit would be to flout the basis of facts upon which common judgment is formed. Nowhere outside a court room would it be proposed that a holding be made that the moneys in the bank are moneys acquired elsewhere than from the obvious source. The process of illation is not strained in the finding that it is a part of the proceeds of the larceny, and therefore should go to the owner of the jewelry.

Ordered accordingly.

THE EQUITABLE TRUST COMPANY OF NEW YORK, Successor by Merger to COLONIAL TRUST COMPANY as Trustee under Certain Trust Agreement, Dated October 10, 1905, between CARL F. PALFREY and COLONIAL TRUST COMPANY, Plaintiff, *v.* EDGAR G. PRATT as Executor of the Last Will and Testament of CARL F. PALFREY, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, January, 1922.)

Trusts — deed containing revocation clause — directions as to payment of income, principal and accumulated dividends, etc. — colleges to take in event of no survivor capable of taking — subject matter of trust was in New York when settlor, who died a resident of California, executed deed in Mexico — no suspension of absolute ownership beyond two lives in being — contingent remainders — evidence — depositions of executor of settlor and another interested in event of action incompetent under Civil Practice Act, § 347 — burden of proof as to change of domicile of settlor from United States to Mexico.

A deed of trust containing a revocation clause provided that all the dividends, interest and income collected by the trustee should be paid to the settlor of the trust, so long as he should live, and thereafter to a nephew during his life and

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upon his death to his wife for life, with direction that upon the death of both the nephew and his wife the trustee should pay one-half of the principal and unpaid accumulated dividends, interest and income, to Harvard College absolutely, and one-fourth to another college absolutely. The remaining one-fourth in equal shares was to be paid to the niece and two nephews of the settlor, or to such of them as should survive him, with proviso that if any of them predeceased him leaving issue the share of any deceased nephew or of the niece was to be paid to their surviving issue. If there were no survivor capable of taking the last quarter of the trust property, two-thirds thereof was to go to Harvard College and the remainder to the other college. The settlor, shortly before leaving Mexico, where he had resided for about four years, to take residence in California where he died and where his will was admitted to probate, duly acknowledged the execution of the trust agreement before the United States consul in the city of Mexico, and the trustee, in the city of New York, to whom the instrument had been mailed by the settlor, executed the same in the usual New York form. The subject matter of the trust was then in the city of New York, and the beneficiaries thereunder within the United States. In an action for the judicial settlement of the accounts of the successor trustee and for a determination as to the validity of the trust agreement, and whether the beneficiaries were entitled to take their respective shares therein mentioned, the executor of the settlor asked for a decree giving to him in his representative capacity the corpus of the trust fund for distribution under the will of his testator, upon the grounds (1) that no trust was created by the alleged trust agreement because the settlor did not at any time divest himself of the legal title to the subject matter of the trust; (2) that under the Mexican law, which it was claimed was controlling, the purported trust agreement was invalid for any purpose; (3) assuming that the settlor did divest himself of title, the attempted trust was invalid under the law of New York, and (4) that in any event the one-fourth contingent remainder to niece and nephews or their issue, with gift over to the colleges, was also invalid under the laws of New York. *Held,* that because of the reserved power of revocation the trust deed did not suspend the absolute ownership of the property, measured by the lives of the settlor and the nephew and his wife.

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The gifts over in favor of the colleges of one-half and one-quarter respectively of the trust property were contingent and not vested, but both were valid, and will vest after the expiration of the only two measuring lives.

The remaining one-quarter of the trust fund upon the death of the life beneficiaries was also contingent, but after the termination of the two measuring lives will vest absolutely in one or more of the persons mentioned, if living, or in their surviving issue, and failing any such, in the two colleges, and the only uncertainty is as to the persons in whom said quarter of the trust fund will vest after the termination of the limiting life estate.

Where duly taken depositions of the executor and of another witness also interested in the event of the action within the meaning of section 347 of the Civil Practice Act, were offered in evidence in support of a claim that the settlor of the trust had changed his domicile from the United States to Mexico, an objection to their reception as incompetent, on the ground that it was sought to prove a Mexican domicile by the settlor's own statement to said witnesses, will be sustained. The depositions having been excluded there was not sufficient other evidence to sustain the claim of a change of domicile.

ACTION for settlement of accounts of trustee under a trust agreement.

Murray, Prentice & Aldrich (H. Tweed, of counsel), for plaintiff.

George O. Redington (H. C. Beach, of counsel), for defendant Edgar G. Pratt, as executor, etc.

Emmet, Marvin & Roosevelt, for defendants Avon Home of Cambridge, Mass., and Harvard College.

Edward B. Boir, for defendants Durfee L. Palfrey et al.

DAVIS, J. This action is brought for the judicial settlement of the accounts of the plaintiff, Equitable

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Trust Company, under a certain trust agreement, dated October 10, 1905, executed by and between Carl F. Palfrey (since deceased) and the Colonial Trust Company, predecessor of this plaintiff. In its prayer for relief plaintiff asks the court to pass upon the validity of the provisions of the trust agreement and to decide whether or not the persons named as beneficiaries in the trust agreement are entitled to take their respective shares therein mentioned. The defendant Edgar G. Pratt is the executor under the will of said Carl F. Palfrey. Letters testamentary were issued to him November 24, 1920, by the Superior Court in the county of San Bernadino, California, where Carl F. Palfrey was domiciled at the time of his death (October 17, 1920), and he asks for a decree giving to him as executor of Carl F. Palfrey the corpus of the trust fund referred to for distribution under Palfrey's will upon the grounds that, *first,* no trust was created by the alleged trust agreement executed by Palfrey October 19, 1905, because Palfrey did not at any time divest himself of the legal title to his property; *second,* Palfrey being domiciled in Mexico at the time of the execution of the trust agreement, the law of Mexico is controlling, and under such law the purported trust agreement is invalid for any purpose; *third,* assuming that Palfrey did divest himself of title, the attempted trust is wholly invalid under the law of New York; *fourth,* in any event, the one-fourth contingent remainder to the nieces and nephews, or their issue, with gift over to Harvard College and Avon Home, is invalid under the law of New York. First, as to the question of the application of the law of Mexico to the execution of the trust agreement: It is conceded by all the parties that the instrument was not executed according to the requirements of the law of Mexico. The executor claims that

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Palfrey was domiciled in Mexico at the time of his execution of the trust instrument, and that having failed to observe the formalities of the Mexican law in its execution the deed is invalid. It is clear that Palfrey did not consider the Mexican law in making the trust agreement, but had in mind the New York law. He acknowledged its execution before the consul-general of the United States in the city of Mexico. He then mailed the document to the Colonial Trust Company in New York, where the latter executed it in the usual New York form. The property which is the subject matter of the trust was then in New York and the beneficiaries were in the United States. These facts alone uphold in some degree the view that Captain Palfrey did not consider himself as domiciled in Mexico. Had he deemed himself so domiciled, it is natural to expect that he would have observed the formalities of the Mexican law in executing the trust deed. However, attaching only slight weight to these circumstances, the other evidence properly in the case on the side of defendants Pratt and Utter fails to sustain the burden of proving that Palfrey changed his domicile to Mexico. Prior to going to Mexico in 1901, Captain Palfrey was an American citizen domiciled in Wilton, Mass., where he maintained a home and where his nearest relatives lived. He had traveled extensively in search of health, and finally took up his residence in Mexico as a suitable place for him to live in. He moved some of his furniture to Mexico and established a comfortable home. He remained there until some time in 1905, when he left Mexico for good and took up his residence in California, where he died, leaving a will which was probated in California. Just before leaving Mexico to take up his residence in California Captain Palfrey executed the trust agreement in question. In support

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of their claim that Palfrey had changed his domicile from the United States to Mexico, the defendants Pratt and Utter offered their depositions taken pursuant to statute. Most of this testimony related to communications between the witnesses and Captain Palfrey. This testimony was objected to as incompetent on the ground that it was sought to prove a Mexican domicile for Palfrey by means of his own statement to parties interested in the event of this action within the meaning of section 347 of the Civil Practice Act. In my opinion this objection must be sustained and the testimony excluded. The defendants Pratt and Utter are parties interested in the event of this action. Their testimony is offered in their own interest against the Equitable Trust Company and the beneficiaries under the trust, who derive their interest through Captain Palfrey, a deceased person. In other words, these witnesses seek by testifying to their transaction with the deceased to defeat his act and deed in their action against those whose interest is derived from and through the deceased. Even with their testimony remaining in the case I should hesitate to find that these defendants had proved a change of domicile on Captain Palfrey's part. Without it, I am convinced the claim of a change of domicile is not sustained. There remains the question whether the trust agreement is valid under the laws of New York. The defendants Pratt and Utter contend that the trust is wholly invalid under the New York law, that by its terms the absolute ownership of the personal property is suspended for a longer period than during the continuance and until the termination of two lives in being at the date of the instrument. Pers. Prop. Law, § 11. They claim that the absolute ownership is suspended for three lives, that of the settlor, of Hersey Goodwin Palfrey and of Mrs. Dur-

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fee L. Palfrey. The trust agreement provides: "The trustee hereunder shall have power and authority to collect the dividends, interest or income from and on all and several the securities deposited hereunder, as well as on all the securities or property which may hereafter be deposited with the said trustee and made subject to the terms of this trust agreement, and the trustee shall pay over all dividends, interest or income when collected in the manner following: *First.* The whole of the dividends, interest or income collected by the trustee hereunder shall be paid by the trustee to the said Carl F. Palfrey, party of the first part, so long as he shall live. *Second.* After the death of said Carl F. Palfrey the dividends, interest or income collected by the trustee hereunder shall be paid by the trustee to Hersey Goodwin Palfrey during his life, and upon his death to his wife, Durfee L. Palfrey, during her life, and upon the death of both said Hersey Goodwin Palfrey and his wife, Durfee L. Palfrey, the principal and unpaid accumulated dividends, interest and income remaining in the hands of the trustee hereunder shall be paid as follows: One-half to Harvard College, absolutely. One-quarter to the Avon Home, of Cambridge, Massachusetts, absolutely. One-quarter thereof, in equal proportions, to the niece and nephews of said Carl F. Palfrey, as follows: Margaret G. Baker, Robert Palfrey Utter and Richard Van Winkle Utter, or to such of them as may be then surviving, or if any of them be not then surviving and leave a child or children him or her surviving, then the share of said deceased nephew or niece to go to such child or children of said deceased nephew or niece. If there be no survivor capable of taking the last mentioned quarter, then two-thirds thereof shall go to Harvard College and one-third thereof to the Avon Home of Cambridge, Massachusetts." The agreement

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also provides that "this trust shall be revocable at will by the party of the first part by notice in writing signed by the party of the first part and delivered to the trustee." As a result of the revocation clause the absolute ownership was not suspended at all during Palfrey's life. Ownership would not be suspended until Palfrey should die without having revoked the trust. Upon the happening of that event absolute ownership would be suspended only during the lives of Hersey Goodwin Palfrey and Durfee L. Palfrey. Captain Palfrey's ownership of the trust fund was as absolute after the execution of the trust instrument as it was before because of his reserved power of revocation. Referring to a reserved power of revocation in a trust instrument similar to the one in question here, the court, in *Van Cott* v. *Prentice*, 104 N. Y. 45, 54, said: "The existence of that (power of revocation) inevitably leaves in the settlor an absolute control, since at any moment he may end the trust and resume possession of the fund as his own. The trustee is directed to hold the fund and invest and reinvest and pay over as ordered, but is to do all this subject to the settlor's absolute control. This cannot mean that the trustee is to have no title and the trust no effective existence, and the property remain in the settlors, but that the trust and the title, good and effectual while it stands, is nevertheless to continue and exist only at the will and pleasure of the settlor." In the article on "Perpetuities," by Professor Warren (30 Cyc. 1511), it is stated: "If a trust is created by deed in favor of the settlor for life, and then over, and the settlor has a power of revocation, there is no suspension during the settlor's life." *United States Trust Co.* v. *Chauncey*, 32 Misc. Rep. 358; *Pulitzer* v. *Livingston*, 89 Me. 359. I, therefore, conclude that the trust deed

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before the court did not suspend the absolute ownership of the property for a period measured by the lives of the three persons mentioned, Captain Palfrey, Hersey Goodwin Palfrey and Durfee L. Palfrey. There remains the question of the validity of the remainder in favor of Harvard College, the Avon Home of Cambridge and of the nieces and nephews of the trustor. In the 2d paragraph of the trust instrument Palfrey directed that after the termination of the life estates "the principal and unpaid accumulated dividends, interest and income remaining in the hands of the trustees hereunder shall be paid as follows: One-half to Harvard College, absolutely; one-quarter to the Avon Home of Cambridge, Massachusetts, absolutely; one-quarter thereof, in equal proportions, to the niece and nephews of said Carl F. Palfrey, as follows: Margaret G. Baker, Robert Palfrey Utter and Richard Van Winkle Utter, or to such of them as may be then surviving; or if any of them be not then surviving, and leave a child or children him or her surviving, then the share of said deceased nephew or niece to go to such child or children of said deceased nephew or niece. If there be no survivor capable of taking the last mentioned quarter, then two-thirds thereof shall go to Harvard College and one-third thereof to the Avon Home of Cambridge, Massachusetts." In my opinion the gifts to Harvard College of one-half of the trust fund and to the Avon Home of Cambridge of one-quarter thereof are contingent, not vested, but both valid. The instrument directs that after the death of the life tenants one-half of the principal and income remaining shall be paid to Harvard College, absolutely, and one-quarter to the Avon Home, absolutely. The direction is simply "to pay" after the death of the life beneficiaries under the trust. Nowhere in the instrument do we find pro-

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visions indicating an intention to make a present and vested gift of those shares of the trust fund. As was said in *Wright* v. *Wright*, 225 N. Y. 329, 336: "Under these circumstances we have the simple case, free from complications, where there is no gift but by direction to trustees to pay at a future time, and in such a case it is perfectly well settled that the legacy will not vest in the beneficiary until the time for payment arrives." Eliminating, as we have done, Captain Palfrey himself as one of the measuring lives, because of his reserved power of revocation of the whole trust, it is clear that the remainders in favor of Harvard College and the Avon Home of one-half and one-quarter, respectively, will vest after the expiration of only two measuring lives, those of Hersey Goodwin Palfrey and Durfee L. Palfrey. The provision disposing of the remaining one-quarter of the trust fund upon the death of the life beneficiaries is also contingent, but it was obvious at the date of the trust instrument that the one-quarter in question would vest absolutely after the termination of two measuring lives in one or more of the persons mentioned, if living, or in their surviving children, or failing any of these capable of taking, in Harvard College and in the Avon Home. When the two life estates end there will be a vesting of the one-quarter in some of the parties mentioned in this paragraph of the trust instrument. There is no uncertainty about the time and fact of vesting. The only uncertainty is as to the persons in whom the one-quarter will vest after the termination of the limiting life estates. Findings and conclusions have been filed.

Judgment accordingly.

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JAMES F. ROGAN, Plaintiff, v. CONSOLIDATED COPPERMINES COMPANY, Defendant.

(Supreme Court, New York Special Term, January, 1922.)

Pleading — action on promissory note — denial of knowledge or information sufficient to form belief as to assignment to plaintiff good under Civil Practice Act, § 261 — affirmative defense that defendant doing business in New York without certificate required by General Corporation Law, § 15 — court no power to strike out answer and grant summary judgment — Rules of Civil Practice, 105, 113.

Rule 113 of the Rules of Civil Practice was intended to prevent a defendant in commercial cases from interposing an answer which would unnecessarily delay the entry of a judgment to which the plaintiff was entitled.

In certain cases the defendant, under said rule, may be compelled to state his version of the matter in litigation, but where he shows an absence of knowledge or information in regard to any material allegation of the complaint he cannot be compelled to accept the plaintiff's version, and in such circumstances the court cannot strike out the answer.

In an action upon a promissory note, the answer, besides a denial that the note was made and delivered in the city of Chicago, as alleged in the complaint, denied any knowledge or information sufficient to form a belief as to the allegations of the complaint concerning the assignment of the note to plaintiff. The answer also set up as an affirmative defense that the note was made and delivered in the city of New York; that the payee is doing business there and has not obtained any certificate of authority as required by section 15 of the General Corporation Law. The plaintiff upon a motion for summary judgment pursuant to rule 113 of the Rules of Civil Practice and for such other and further relief as the court might deem just, presented affidavits showing that the note was assigned to him by written instrument and further, that the note was sent to the office of the payee in Chicago, inclosed in a letter from the defendant requesting the payee to accept the note in renewal of a note previously given, and that the payee

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thereupon wrote to defendant that it would accept the note. While the defendant presented no proof in contravention of the allegations of the moving papers, it did appear that on the examination before trial of one of defendant's officers, he admitted that according to his best recollection the note was made and delivered in the manner claimed by plaintiff. *Held*, that upon the undisputed facts the note was made and delivered in the city of Chicago, but there being no claim that defendant has any knowledge or information other than that derived from the allegations of the complaint and the moving affidavits, as to the assignment of the note to plaintiff, the defendant in the circumstances was permitted by section 261 of the Civil Practice Act to deny knowledge or information sufficient to form a belief as to these allegations, and thereby raise an issue, and as matter of law was entitled to defend; the court, therefore, was without power to strike out the answer and grant a summary judgment.

The motion not having been made within twenty days after the service of the answer, as required by rule 105 of the Rules of Civil Practice, the question whether under any other rule the court could strike out the affirmative defense alone may not be considered.

ACTION to recover on promissory note. Motion for summary judgment.

Gould & Wilkie (Charles G. Keutgen, of counsel), for plaintiff.

Roy F. Wrigley, for defendant.

LEHMAN, J. The plaintiff has brought an action as assignee of a note made and executed by the defendant. The complaint alleges that the note was made and delivered at Chicago, Ill. The answer denies that the note was made and delivered in the city of Chicago or elsewhere in the state of Illinois and "denies any knowledge or information sufficient to form a belief" as to the allegations concerning the assignment and the answer further contains an affirmative defense

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that the note was made and delivered in New York city and that the payee is doing business in the city of New York and has not obtained any certificate of authority as required by section 15 of the General Corporation Law of the state of New York.

The plaintiff has now moved for "an order striking out the answer herein and directing judgment in favor of the plaintiff pursuant to rule 113 of the Rules of Civil Practice and for such other and further relief as this court may deem just." Upon the motion the plaintiff has presented affidavits showing that the note was assigned to him by written instrument and further shows by affidavit that the note was sent to the office of the payee in Chicago, inclosed in a letter from the defendant requesting the payee to accept the note in renewal of a note previously given and that the payee thereupon wrote to the defendant that it would accept the note. The defendant does not present any proof in contravention of the allegations of the moving papers and it appears that the defendant has been examined before trial through one of its officers who admitted that according to his best recollection the note was made and delivered in the manner claimed by this plaintiff.

If upon this motion the court has power to determine the issue raised by answer then it is plain that the court will be bound to order judgment in the plaintiff's favor. I think it is clear, however, that the court has no power to pass upon any issues upon this motion. From time immemorial litigants have had the right to have issues arising in actions at law proven by witnesses subject to cross-examination on the witness stand, and even if the legislature has power to change in so drastic a manner the form in which issues in this kind of action have always been litigated the courts should not by construction of

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rules or statute, in the absence of clear and unambiguous language, create such a change. Moreover, it is, to say the least, doubtful whether the legislature could make such a change without contravening the provisions of the Constitution which declares "that the trial by jury in all cases in which it has heretofore been used shall remain inviolate forever."

Rule 113 of the Rules of Civil Practice was intended to prevent a defendant in certain classes of cases, which for convenience I may call commercial cases, from interposing an answer which will unnecessarily delay the entry of a judgment to which the plaintiff is entitled. It provides that where the plaintiff presents an affidavit "verifying the cause of action and stating the amount claimed and his belief that there is no defense to the action," the answer may be struck out and the judgment entered in favor of the plaintiff, unless the defendant shall show "such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend." If the answer contains no denials which raise a formal issue and no affirmative allegations sufficient if true to constitute a defense, the court could even without the new rule grant judgment on the pleadings and affidavits as to the actual facts would be irrelevant and unnecessary. Obviously, therefore, it was intended under the new rule that the court should have power to determine, not whether the pleadings raise an issue, but whether upon the actual facts as presented upon the motion the defendant is "entitled to defend." Upon these points the rule seems entirely clear and the difficulty is only in arriving upon a proper determination of *when* a defendant is entitled to defend. Since the rule does not attempt to define the right to defend, it cannot be interpreted as conferring upon the court the power to deny to a party the right to

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defend in any case where by statute or common law such right exists, but since the rule does give the court power to strike out an answer it is evident that a distinction must be drawn between the right to interpose an answer which will create formal issues and thereby delay the entry of a judgment until such formal issues have been disposed of and the right to have actual issues tried by court or jury. Pleadings are merely a formal system developed by courts and legislatures in order that actual issues may be properly formulated for trial and the formal system may be changed whenever it proves ineffective for the purpose for which it was devised, and the right to defend does not include the right to interpose a pleading which raises an apparent issue where no issue between the parties actually exists. It seems to me clear, therefore, that it was the intent of this rule that the court should in the class of cases covered by rule 113 determine upon motion whether there is any actual issue between the parties and if there is no issue, the court should strike out an answer which raises merely an apparent issue. In using the term "issue," I mean issue of fact, for if upon the conceded or undisputed facts there is as a matter of law no defense to the action, then it would seem clear that the defendant is not entitled to defend. I have not overlooked the fact that there are statements contained in opinions, even by the Court of Appeals, of great weight and authority which, at least at first sight, are not entirely in accord with the distinction I have drawn; yet upon careful consideration, I feel that these statements cannot be held properly applicable to the new rule, which is the result of a vast experience which has shown that our system of formal pleading is imperfect in operation and at times serves to impede justice. In the case of *Way-*

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land v. *Tysen*, 45 N. Y. 281, the Court of Appeals in an opinion by Grover, J., decided that the provision of the Code which purported to give the court power to strike out sham answers and defenses did not confer any new power upon the court, and that under that provision the court could not strike out as sham a denial, however untrue. The opinion contains expressions which even might perhaps be interpreted as authority for the view that the constitutional provisions securing the right of a trial by jury would be infringed by a statute giving the court the right to strike out a pleading creating what was formerly called a "general issue," and also that the court could not strike out as sham a verified affirmative defense; yet in numerous subsequent cases the power of the court to strike out as sham, verified affirmative defenses which were shown to be untrue beyond dispute, has been successfully asserted, and in the case of *Harley* v. *Plant*, 210 N. Y. 405, the Court of Appeals expressly decided that the validity of a denial of knowledge or information which is presumptively false should be tested by a motion to strike out as sham, and in *Dahlstrom* v. *Gemunder*, 198 N. Y. 449, the same court decided that such a denial when untrue beyond dispute, raises no issue and may be disregarded. It may be urged, however, that since the court can under no reasonable construction of rule 113 strike out an answer containing denials or allegations which if true would defeat the cause of action, a summary judgment entered in accordance with that section necessarily involves a determination of the truth or falsity of the answer, and is in effect a determination in advance of a trial, or perhaps it would be more accurate to say, without a trial, of the issues raised by the pleadings. This view would seem to derive considerable support from the

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reasoning of the opinion in the case of *Wayland* v. *Tysen, supra,* but it rests upon the assumption that under our system of pleading one party cannot assert a fact and the other party deny it unless one of them is guilty of perjury, or at least is relying upon a defective memory or untrue information, and there is, therefore, a real issue between the parties which can be resolved only by weighing conflicting proof.

Our system of pleading requires the pleader to state the material *facts concisely.* The "facts" which the pleader may state are the ultimate facts, and may be and usually are the result of a deduction or inference from the evidentiary facts, and this deduction or inference may follow as a matter of law or may be merely an inference which the trier of the facts, either court or jury, as the case may be, might reasonably draw. See *De Cordova* v. *Sanville,* 165 App. Div. 128; revd., 214 N. Y. 662, upon dissenting opinion of Ingraham, J. The complaint in an action covered by rule 113 must contain allegations that a contract has been made and breached, or a judgment duly rendered. These allegations are almost necessarily conclusions drawn from other parts yet the defendant cannot ordinarily raise an issue as to the correctness of the conclusion even though both parties are agreed upon the evidentiary facts, except by a general denial, and if the defendant desires to set up an affirmative defense he must in his turn allege ultimate facts which may rest upon a deduction or inference from other facts. An honest debtor may frequently be compelled to deny an allegation of the complaint which is in fact true, or allege affirmatively a fact which is untrue because in good faith he desires to test the correctness of his conclusions as to the existence of the ultimate fact alleged, and this cannot constitute perjury, while a dishonest debtor may be

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encouraged to deny an ultimate fact or set up an affirmative fact, although he knows his denial or allegations to be untrue because he is in no danger of a conviction of perjury if he can claim that his denial was due only to a mistaken inference. In other words our system of formal pleading has failed in many instances in this class of cases to perform its true function of stating the actual issues between the parties which should be tried by a jury and has become an instrument whereby the entry of a judgment to which the plaintiff is entitled may be delayed.

Rule 113 does not in my opinion attempt to change our system of formulating the issues between the parties or our system of trying the issues so formulated. Issues must still be formulated through the pleadings and must be determined upon a trial, but the rule does provide a method in certain cases whereby the court can determine whether there are any issues between the parties which require formulation or trial. The power to strike out an answer can be exercised by the court only where the plaintiff has presented not merely a complaint but an additional affidavit "verifying the cause of action" and negativing the existence of a defense, and the defendant has failed to interpose an affidavit sufficient to show that he is entitled to defend. If the defendant is entitled to defend, the plaintiff's motion for summary judgment must be denied and the case proceeds upon the formal issues previously raised; if the defendant is not entitled to defend, then the answer is stricken out and the formal issues are destroyed. If there are any real issues between the parties, then as a matter of law the defendant is entitled to defend, and if there are no real issues then the defendant cannot complain that he has been deprived of any right to a jury trial. If the affidavits

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presented by both parties show without dispute the existence of facts upon which the court after a trial would be bound as a matter of law to direct a verdict, then there are no issues in the case which require a trial. The affidavit of the plaintiff should show that evidentiary facts exist from which the conclusion must follow as a matter of law that the plaintiff's claim is valid and enforcible and if the defendant fails then to show that he disputes the existence of the evidentiary facts or that other facts may exist which change the legal inference to be drawn from the undisputed facts or which may constitute a defense to the plaintiff's cause of action, then the answer could serve no purpose except to delay and impede the plaintiff in his legal rights. In other words, the court has no power to decide any issues of fact or to preclude the defendant from a trial of such issues as formulated by the pleadings, but it has power regardless of the answer to grant summary judgment under rule 113 where no issue of fact exists and in all applications made under that rule the sole test to be imposed is whether the answer serves to formulate actual issues between the parties or serves only to impede justice.

In the present case the affidavits show that there is no real issue of fact between the parties in regard to the place of delivery of the note. The denial that it was delivered in the state of Illinois and the allegation that it was made and delivered in the city of New York may have been made in good faith, but they both rest upon a conclusion drawn from the same facts upon which the plaintiff has based his allegation that the note was delivered in the state of Illinois. If the plaintiff's conclusion is correct as a matter of law then the defendant has no right to delay or impede the enforcement of plaintiff's legal remedies by its

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formal denial of the plaintiff's allegations of an ultimate fact which rests upon undisputed evidentiary facts from which but one inference can be drawn. Upon the undisputed facts in this case it appears as a matter of law that the note was made and delivered in Chicago. If the answer thereafter contained only the affirmative defense the court could properly grant the plaintiff's motion to strike out the answer.

As stated above, however, the answer also contains a denial of knowledge or information sufficient to form a belief as to the assignment to the plaintiff. The Civil Practice Act, section 261, still permits a defendant to deny any knowledge or information of any material allegation of the complaint. The defendant does not concede that there has been any assignment but on the contrary disputes that assignment in the manner permitted under the law. Under rule 113 a defendant may properly in certain cases be compelled to state his version of the matter in litigation, but where he shows that he has no knowledge or information in regard to any material allegation made by the plaintiff, he cannot be compelled to accept the plaintiff's version and the court under such circumstances cannot strike out the answer. Since it is not claimed in this case that the defendant has any knowledge or information other than that derived from the allegations of the complaint and the moving affidavits of this plaintiff as to the assignment and since under such circumstances the Civil Practice Act permits it to deny knowledge or information sufficient to form a belief as to these allegations and thereby raise an issue, the defendant is as a matter of law entitled to defend the action and the court has no power under rule 113 to strike out the answer and grant a summary judgment. In view of the fact that the motion was not made within twenty days after service of the

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answer as required by rule 105, I cannot consider whether under any other rule the court could strike out the affirmative defense alone.

Plaintiff's motion must therefore be denied, with ten dollars costs.

Ordered accordingly.

ETHEL ROSZA, Plaintiff, *v.* MILTON M. ROSZA, Defendant.

(Supreme Court, New York Special Term, January, 1922.)

Marriage — annulment for fraud — broken promise to have Jewish ceremonial marriage.

Where a husband absolutely refuses to have a Jewish ceremonial marriage performed in fulfillment of his promise made to his wife before the civil marriage, and the referee to hear and determine the issues in an action for the annulment of the marriage on the ground of fraud finds that because of such refusal there has been no cohabitation between the parties, the report of the referee in favor of plaintiff will be confirmed.

ACTION for annulment of a marriage on the ground of fraud.

Lind & Pfeiffer (Alexander Pfeiffer, of counsel), for plaintiff.

Nordlinger & Riegelman, for defendant.

COHALAN, J. The action is one for the annulment of a marriage on the ground of fraud. Both plaintiff and defendant are of the Hebrew race and Jewish faith. The plaintiff asserts that for the purpose of inducing her to consent to the civil marriage the defendant fraudulently and falsely represented and promised that he would marry her according to the Jewish religion and customs; that relying upon these

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promises she married the defendant on April 1, 1919, in the office of the city clerk; that, subsequent to this marriage, the plaintiff frequently asked the defendant to carry out his promise and that he continually refused so to do. The defendant in his answer admits that both parties are of the same race and religion; the performance of the civil marriage; that no religious ceremony has been performed; that he has been asked by the plaintiff and has refused thus to be married. The issues were referred to I. Maurice Wormser, Esq., as referee, to hear and determine, and his report is now before me for confirmation. The learned referee in his oral opinion, rendered at the closing of the hearings, and in his written report, gives a clear and correct interpretation of the law applicable to a case like the present. The plaintiff was a young woman brought up in and strictly adhering to the faith of her fathers, observing in detail the practices of her religion, regularly attending its house of worship and being one of a family all the others of whom, like herself, were strictly orthodox in their beliefs. All of the then members of the plaintiff's family and their married relatives had been married according to the strict orthodox ceremonies of the Jewish religion. A sister of the plaintiff, some time after the marriage now in question, was married according to such rites. The defendant, although repeatedly asked after the civil ceremony to keep his promise to have a Jewish ceremonial marriage, refused so to do. The plaintiff says that she never would have consented to the civil ceremony had she not believed it would be followed by a religious one, and that she at no time believed the marriage to be binding without the religious ceremony. The referee has found that the representations made by the defendant were false and fraudulent and were mate-

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rial, and that without them the plaintiff would never consent to consummate the marriage by cohabitation. He finds, further, that because of the refusal of the defendant to have the religious ceremony there has been no cohabitation between the parties. Section 1750 of the Code of Civil Procedure, now section 1139 of the Civil Practice Act, authorizes in an action by the party defrauded the annulment of a marriage on the ground that the consent of one of the parties was obtained by fraud. This section authorizes the annulment of a marriage for any fraud or deception which would invalidate or authorize the cancellation of any contract. *Di Lorenzo* v. *Di Lorenzo,* 174 N. Y. 467. The fraud must be material to the making of the contract. It must be material to the extent that had the promise not been made the party deceived would not have consented to the marriage. Any misrepresentation of a material fact made to induce another to enter into an agreement and without which he would not have done so requires the court to vacate the agreement. This is the general rule of contracts, and the marriage contract is no exception thereto. The plaintiff in the instant case has proved to the satisfaction of the referee that there was a misrepresentation of an essential element in the giving of her consent to the contract of marriage; that this misrepresentation was of such a nature as to deceive an ordinary prudent person, and did deceive her, and that she is therefore entitled to the relief sought. *Rubinson* v. *Rubinson,* 110 Misc. Rep. 114; *Di Lorenzo* v. *Di Lorenzo,* 174 N. Y. 467; *Watkins* v. *Watkins,* 197 App. Div. 489; *Svenson* v. *Svenson,* 178 N. Y. 54. I have carefully gone over the testimony, the learned opinion and the report of the referee. I agree with him and his report accordingly is confirmed.

Report of referee confirmed.

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WOOLF SEGENFELD and SAMUEL KALIN, Copartners Doing Business under the Firm Name and Style of the Neutral Embroidery Works, Plaintiff, *v.* ZACHARY L. FRIEDMAN, Individually and as President of the Bonnaz, Singer and Hand Embroiderers Union, Local No. 66, etc., et al., Defendants.

(Supreme Court, New York Special Term, January, 1922.)

Equity — police duty not within its province — injunction pendente lite not granted to restrain continuance of strike where plaintiffs broke contract with employees — constitutional law — right to picket — right to refuse to hold conversation.

A court of equity is not a police station and while the court will always use its powers to prevent the infliction of irreparable injury, there should not be imposed upon it the ordinary performance of police duty.

Upon a motion to continue an injunction *pendente lite* to restrain the continuance of a strike, affidavits stating that individual defendants have been guilty of acts of violence, of truculence, of the use of opprobrious epithets, and of interfering with plaintiff's employees, considered in connection with the emphatic denials of the accused defendant, are not of that convincing character which justifies the intervention of equity.

Where it appears that the plaintiffs, themselves, in attempting to reduce the wage scale provided for in a collective bargaining contract to which they with others and the defendant labor union were parties, have broken the contract without the consent of the parties thereto and without resorting to the readjustment machinery agreed upon, the motion will be denied and the injunction dissolved.

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, distinguished.

The right to picket is founded on constitutional principles and no sound principle of law prohibits orderly picketing or that which does not infringe upon the rights of others, and whether one or several pickets be maintained is not material.

It is also the constitutional right of every person to refuse to hold conversation with others.

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MOTION for continuance of injunction *pendente lite.*

Gordon, Tally & Gordon (Harry A. Gordon, of counsel), for plaintiffs.

Morris Rothenberg, for defendants.

WAGNER, J. The plaintiffs apply for an injunction *pendente lite,* restraining the defendants from continuing a certain strike now being carried on against the plaintiffs, from picketing in the vicinity of plaintiff's place of business in connection with said strike, from attempting to induce plaintiff's employees to join the strike, and from committing certain unlawful and disorderly acts claimed to have been committed by certain of the defendants in the course of the strike. It would be useless in this memorandum to state at length the facts involved in the controversy.

The defendant union cannot be enjoined *pendente lite* for no proof is presented to establish that it either authorized or ratified the acts complained of. To identify the union with the acts of others, clear and convincing evidence is required. A labor union is a legal entity. Between it and its members there is a distinction as well defined as that existing between individual members of the union. In the same manner as the acts of one member do not bind another, so the acts of the individual will not bind the association, without additional proof that there was an associated promotion or ratification of the acts complained of.

The affidavits submitted, alleging that individual defendants have been guilty of acts of violence, of truculence, of the use of opprobrious epithets, and of interfering with plaintiff's employees, when considered with the emphatic denials of the defendants accused, are not of that convincing character to justify equity's intervention. While a court of equity will

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always use its powers to prevent the infliction of irremediable damages, there should not be imposed upon it the ordinary performance of police duty.

If a defendant, as is alleged, committed the assault charged, he could easily be apprehended and prosecuted if a complaint were lodged with the police authorities. The most drastic, severe, and permanent of all injunctions against violence is the Penal Law. Constant in its operation, it stands as a deterring influence upon those animated with unlawful purposes or designs, and equity's reluctance to interfere with its performance is well settled and recognized. A court of equity is not a police station.

I am also asked to restrain the picketing which some of the defendants are concededly doing in the vicinity of the plaintiff's place of business. I know of no sound principle of law which prohibits orderly picketing or that which does not transgress on the rights of others. Indeed, a great body of law affirmatively establishes the opposite proposition. The right to picket is founded on constitutional principles, and although it might appear that some recent adjudications in certain jurisdictions encroach upon this right, the constitutional guarantee still survives and must be respected and upheld. Nor is it material whether one or several pickets be maintained. Right or wrong is not determined by mere numerical considerations. The act of a single man, if right, is not made wrong because it is performed by several men. The right to freedom of speech and freedom of action belongs not only to the individual, but to individuals combined for a lawful purpose. That several insist on exercising their rights simultaneously does not of itself transmute their act to a wrong or illegality. Of course, if the employees approached are unwilling to listen to argument or inducement brought forward by defend-

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ants, they should not be disturbed, for it is the constitutional right of every person to refuse to hold conversation with others, even if such arguments be fortified with wisdom or benefit to the person whose audience is sought.

The plaintiffs also assert that their legal rights are being violated, because the pickets are attempting to induce plaintiffs' employees to abandon plaintiffs' employ and join the union in violation of their agreements of employment. Were plaintiffs' cause not impaired by their own breach of contract their ground for relief would be persuasive. It is always difficult to decide questions of fact upon sharply conflicting affidavits, for there is lacking the opportunity to confront the witnesses and to hear them testify. Of course, my findings now are not conclusive, but I lean to the view that the plaintiffs breached the collective bargaining contract to which they with others and the defendant union were parties, in attempting to reduce the wage scale provided for in the aforesaid pact without the mutual consent of the parties and without resorting to the readjustment machinery agreed upon. Under such circumstances the decision in the case of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, relied upon by plaintiffs as a precedent, has no application, for in that case there were valid existing contracts which defendants were attempting to induce the workers to abandon, and the plaintiffs' cause there was not tainted with a breach. To seek the aid of equity the applicant must himself do equity.

The motion is denied and temporary injunction is dissolved. Settle order on notice.

Motion denied and temporary injunction dissolved.

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BENJAMIN SCHLESINGER, as President of the International Ladies' Garment Workers Union, et al., Plaintiffs, v. PHILIP QUINTO, Individually and as Treasurer of the Cloak, Suit and Skirt Manufacturers Protective Association, et al., Defendants.

(Supreme Court, New York Special Term, January, 1922.)

Courts — decision should be in harmony with corrective legislation — agreement adopting week work system in place of piece work and for reduction in hours of labor — employers' association adopted resolution in effect to break agreement — labor union of employees granted an injunction pendente lite — no adequate remedy at law.

The progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, cannot be ignored by the courts, and their decisions should be in harmony with and not in defiance of that modern conception.

After a contract, to continue until June 1, 1922, made between the defendant, an employers' association, and a labor union of garment workers, which provided for the week work system in the place and stead of the so-called piece work system formerly prevailing in the garment industry, and for a reduction in the hours of labor from forty-eight to forty-four hours per week, had gone into effect and the workers were operating thereunder, the defendant broke the contract by the adoption of a resolution which in part stated: "It has become necessary to substitute in the industry the piecework system for the week-work system, to establish an increase of the number of working hours in the week and to fix a reduction of the wages of the workers in those branches of the industry where, by the nature of the services rendered, it is required that they be retained on the week-work system;" and further:

"That in order to bring into full force and effect the above changes in the industrial standards of the industry there be promulgated an order, binding upon every member of this association, that beginning Monday, November 14, 1921, each

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and every member will operate his factory on the piece-work system and at the scale of wages and for the working week established by the executive committee."

This resolution went into effect on October 25, 1921, and ever since has been observed and acted upon by the members of the defendant association. The refusal of plaintiff to accede to the new system of work set up by the employers, as they claimed, in contravention of the collective agreement resulted in what was commonly known as the "garment strike." *Held*, that as under the by-laws of the defendant association its members were bound to and did carry out its directions to repudiate its legal obligations, such act constituted a conspiracy and a violation of plaintiff's legal rights.

It appearing that there are over forty thousand workers whose rights are involved and over three hundred members of the defendant association and that the trial of an action to enjoin the violation of the contract or the doing of any act in furtherance of the conspiracy can hardly be had within the lifetime of the contract, the plaintiffs will be granted an injunction *pendente lite*, they having no adequate remedy at law.

MOTION for injunction *pendente lite*.

Morris Hillquit and Samuel Untermyer, for plaintiffs.

William Klein, Max D. Steuer and Charles H. Tuttle, for defendants.

WAGNER, J. The plaintiffs move to continue *pendente lite* a preliminary injunction enjoining the defendants from combining and conspiring to order, direct, instigate, counsel, advise or encourage members of the defendant association to violate a certain agreement made between the association and plaintiffs' union, and from doing any act in furtherance of such conspiracy.

The contract, the subject of this litigation, was entered into between the Cloak, Suit and Skirt Manufacturers Protective Association, acting on behalf of its members, employees, and the International Ladies'

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Garment Workers Union and its subsidiary, the Joint Board of Cloakmakers Unions of the City of New York, representing the employees, on May 29, 1919, to continue operative up to June 1, 1922.

This agreement was the culmination of a long-continued economic struggle between the parties, and for the first time recognized in a collective bargaining contract the week work system in place and stead of the so-called piecework system formerly prevailing in the garment industry, and provided also a reduction in the hours of labor from forty-eight to forty-four hours per week. This innovation the workers regarded as a great stride forward in their struggle to raise their standard of life. Under the piecework system there was no uniform or fixed scale of wages. Besides the constant disputes that arose as to what the employee should receive for a particular garment, the workers contend that the piecework system was an incentive to work with an intensity injurious to their health, principally in view of the fact that the industry is seasonal, the periods of work, therefore, rare, and the worker in his anxiety to make up for the slack time would strain himself beyond his physical endurance and thus fall into ill-health, in many cases hopeless.

After the agreement had gone into effect relations theretofore strained were resumed and peace once more restored in the industry, and the workers began operating under the new system. During the transitional period, as might well have been contemplated in so radical a change in the method of production, complaints were made on both sides respecting "soldiering on the job," due to security of position on the one hand and the inadequacy of wages due to the constant increase in living costs on the other. These difficulties, involving isolated instances, were adjusted by

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voluntary concessions of higher wage and the averting of intended or actual stoppages of work. And so matters proceeded until the request of plaintiffs on behalf of the workers in the early part of November, 1919, for an appreciable increase in the scale of wages provided for in the contract due to the more aggravated conditions then prevailing, but which clearly in nowise was to affect the integrity and mutuality of obligations under the agreement.

Discussions became more acute on this question as the differences of opinion widened, with the result that the parties found themselves engulfed in an acrimonious controversy, both private and in the advertising columns of the press, in which the respective contentions were strikingly and appealingly presented to gain for themselves public approval and support. Apprehensive of public calamity, Governor Smith summoned representatives of the opposing factions to a conference, resulting in their consent to the appointment of a board, with power to make a final and conclusive disposition of the controversial matter. The report of this board, after an extended examination into the statistics as to increased living costs, made a unanimous finding that the workers were entitled to a wage increase, "called for by certain conditions inherent in the industry," to be absorbed by the increased productivity and conservation of other manufacturing costs.

After acceptance of the board's decision its interpretation caused a divergent view as to the parties to be benefited. Because of the equivocal language in portions of the report the difference of opinion as to its interpretation was not without justification. To the plaintiffs it spelled out a clear increase of the minimum wage scale therein provided. To the defendants the benefits thereunder were to accrue only to those

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employed at the time of its rendition and future employees were not entitled to participation.

Attempts to persuade the defendants to confer failed. They insisted upon the correctness of their interpretation and their right of self-construction.

Solicitations that the source of origin, namely, the board, should be requested to interpret its own decision, were summarily refused. The deadlock was further accentuated by plaintiff's claim that independent contractors who had accepted the new award by private agreement and were now seeking membership in defendant association for the purpose of taking advantage of its construction as to who shall benefit by the increase were so accepted in violation of the agreement. Discontent among the workers followed disappointment. Their fruitless appeals to the unions, which in view of defendants' attitude on the question of interpretation could afford no assistance, resulted in sporadic strikes. These were few, however, in comparison with the extent of the work, and in most instances inconsequential in duration. Importunities by plaintiff union succeeded in many cases to a return of the men to work, though it failed in some few instances, owing to the obdurate conduct and inflexible state of mind of the workers.

Finally, on October 6, 1920, the defendant addressed a communication to the union stating on account of strikes against its members the contract obligations had been violated, and threatened a discontinuance of "function of the machinery of the contract for adjustment of grievances." The plaintiffs replied disclaiming any connection with or instigation of strikes, and again appealed for the submission of the question of interpretation of the board's decision as to awards. From then on, in accordance with their previous notification, the defendants ceased the adjustments of fur-

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ther disputes pursuant to the methods set up in the agreement. The letter itself and the developments that followed are significant of its purpose in view of the claim made by the defendants that thereafter they considered the binding force of the contract at end. By its terms it made no pretense of abrogating the existing agreement as a whole. It confined the discontinuance of recognition merely to one of its provisions, namely, that involving the adjustment of disputes. There was no mention nor implied abandonment of the provisions relating to hours of labor, wages, labor conditions or others that formed the real basis and purpose of the collective bargaining agreement, as indeed there were none in fact, as such were continued and observed in practice long after the adjustment routine had gone into temporary disuse and clearly defendants' refusal to carry out the above-named provision did not, as against plaintiffs' protest and in the absence of rescission, vitiate the agreement.

In April, 1921, communications were again resumed by the association with plaintiffs with the view of increasing the productivity in the trade by reason of the alleged refusal of the public to purchase their product at high prices then obtaining. The union accepted the invitation to conference on this question, and on June 3, 1921, the parties entered into the following agreement:

"(1) Both sides are in accord that it is in the interest of the industry to readjust the same in such a manner as to enable the manufacturers to sell their product at more attractive prices, and they therefore agree to proceed at once to the organization of a joint commission, to be composed of three members of the association and three members of the unions, whose task it shall be:

"(a) To study shop and labor production records

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and other available data with a view of working out measures which would tend to bring up the productivity of the workers to a point fair and proper to both sides.

"(b) The commission shall report once a month, and on November 1, 1921, it shall make a final report of its activities and findings before a joint committee of the representatives of the association and the unions, and shall accompany such report with complete and appropriate recommendations.

"(2) Until November 1, 1921, the commission shall also act as a joint appeal committee and shall pass upon all complaints on the part of the employers and discharged workers presented to it by the unions or associations arising out of any controversy or dispute about the adequacy of productivity. In determining any case the labor records of the workers in the shop in question shall be taken as the basis for the committee's decisions. If such records will substantiate the contention of the employer the action of the employer shall be sustained by the committee.

"(3) Both sides agree to enforce compliance with the decisions of the joint committee.

"(4) All complaints shall first be taken up by the clerks of the unions and the association for investigation and adjudication.

"New York, June 3, 1921.

"CLOAK, SUIT & SKIRT MFRS. PRO. ASS'N.
"LOUIS LUSTIG, *Chairman.*
"By MAX LACHMAN, *Vice Chairman.*
"INTERNATIONAL LADIES' GARMENT WORKERS UNION.
"BENJ. SCHLESINGER, *Pres.*,
"JOINT BOARD CLOAK, SKIRT & REEFER MAKERS UNION,
"ISRAEL FEINBERG, *General Manager.*"

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Thereafter the joint commission provided for in the agreement was appointed for the settlement of the disputes arising in regard to lack of productivity and passed upon grievances as presented.

Whether the agreement was a supplemental or supplanting one to that of May 29, 1919, is disputed in the affidavits, the employers contending that the June agreement supplanted the earlier one and alone was in force, leaving them free to take whatever action they deemed fit after the date of its expiration, November 1, 1922, while the plaintiffs claim it was but an amendment of and supplementary to that already existing and in force. Looking at the scope of the agreement's provisions, I think it indubitable that it was neither designed to supplant nor interfere with the contract of May 29, 1919, except to devise some agreeable method after suitable investigation to govern the requirements of production. "The working out of measures which would tend to bring up the productivity of the workers" was its expressed and sole purpose. The appointment of a commission to report its recommendations in that respect was its means. In fact the jurisdiction of the commission to adjust grievances related exclusively to those of adequacy of production. Moreover, the subsequent actions of defendants furnish conclusive evidence that both they and plaintiffs considered the original collective agreement in existence and in full operation.

Subsequent complaints of defendants as to shop strikes were couched in the identical language employed before the supplemental agreement had been made. In such complaints distinct reference was made "to the terms of our agreement." Without a single reference to strikes in the one it could hardly be presumed otherwise than that the other was the basis of the complaint. Numerous compliances by the

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association with the requirements of clause 10 as to registration of names and addresses of contractors employed by its members give further support to the view. The distribution of payments for wages collected from employers after dispute, together with written notices to plaintiffs of the admission of new members, both governed by the original agreement, make irresistible the conclusion that the collective agreement was still in force and so regarded by the parties.

It therefore, so far as the purposes of this motion are concerned, becomes unnecessary and immaterial to decide whether, prior to June 3, 1921, either of the parties had violated or breached the conditions of the agreement. Whatever had before occurred was to all intents waived by both, and not only was its full operation reinstated on that date and its provisions thereinafter complied with, but an additional instrument had been created to adopt procedure to better carry out its terms. So, again, whether in the following October, when the association gave notice at a meeting of the commission appointed by the June agreement, through its representatives on said commission, of its intention to substitute the old system of piecework, the plaintiffs protested, as they claim, though this is denied by defendants, that such a recommendation would transcend the powers of the commission and be incompatible with the terms of the collective agreement of May 29, 1919, has no bearing on the legal question here presented. The June agreement being supplemental to that of May 29, 1919, no recommendation under the former could override or make nugatory the fundamental benefits secured to plaintiffs under the latter.

Subsequently and on October 25, 1921, the association adopted a resolution which in part stated:

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"It has become necessary to substitute in the industry the piecework system for the week-work system, to establish an increase of the number of working hours in the week and to fix a reduction of the wages of the workers in those branches of the industry where, by the nature of the services rendered, it is required that they be retained on the week-work system;" and further:

"That in order to bring into full force and effect the above changes in the industrial standards of the industry there be promulgated an order, binding upon every member of this association, that beginning Monday, November 14, 1921, each and every member will operate his factory on the piece-work system and at the scale of wages and for the working week established by the executive committee," which went into effect on the date named and ever since has been observed and acted upon by the members of said association.

Refusal of the plaintiffs to accede to the new system of work set up by the employers, as they claimed, in contravention of the collective agreement resulted in what is now commonly termed the "garment strike."

Thus out of the mass of affidavits submitted by both sides, with denials and some conflict of facts, there survives clearly a preponderance of evidence in favor of plaintiff establishing its right to the extraordinary relief sought.

While this application is novel, it is novel only in the respect that for the first time an employees' organization is seeking to restrain their employers' organization from violating a contractual obligation.

It is elementary, and yet sometimes requires emphasis, that the door of a court of equity is open to employer and employee alike. It is no respecter of persons — it is keen to protect the legal rights of all.

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Heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable illegal acts of the employee.

But mutuality of obligation compels a mutuality of remedy. The fact that the employees have entered equity's threshold by a hitherto untraveled path does not lessen their right to the law's decree.

Precedent is not our only guide in deciding these disputes, for many are worn out by time and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate cannot be ignored by the courts. Our decisions should be in harmony with that modern conception and not in defiance of it. Some *nisi prius* adjudications rendered in these disputes, disputes in which the public is as much interested as the contending parties, have in my judgment reflected a somewhat imperfect understanding of the trials and hardships experienced by the workers in their just struggle for better living conditions.

Being persuaded by the proof adduced that the contract with its modifications was in force on October 25, 1921, the resolution adopted by the defendant association on said date contemplated a material breach of said contract. Further, such contemplated breach was carried out, for on the appointed day (November 14, 1921) the members of the association re-established the piecework system in their factories.

Since the members of defendant association were by the by-laws bound to and did carry out the directions of the association to repudiate its legal obligations, the act constituted a conspiracy. A combination to procure a concerted breach of contract by the

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members constitutes a violation of plaintiffs' legal rights. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 257.

Is, under such circumstances, a court of equity helpless to give succor to plaintiffs? I think not.

In *Grassi Contracting Co.* v. *Bennett*, 174 App. Div. 244, the court said: "Where a strike or other action is threatened by a labor union in violation of its contract or of the contract of its members with their employers, the jurisdiction of a court of equity to issue an injunction is well recognized."

In the case of *Beattie* v. *Callanan*, 82 App. Div. 7, the defendant, a labor union, sought to induce workers who were under contract with their employer to quit work and in other ways to interfere with the performance of the employment contract. The union was enjoined from interfering.

In the well-known case of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, a labor union was restrained from "(1) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the Union, or because plaintiff runs a non-union mine; (2) Interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and wilfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees; (3) Knowingly and

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wilfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine, etc.; (4) Interfering or attempting to interfere with plaintiff's employees so as knowingly and wilfully to bring about the breaking by plaintiff's employees, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and wilfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent; (5) Trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such; and (6) Compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment therein."

Abundant additional precedents exist supporting plaintiffs' plea for equitable relief, but it would serve no useful purpose to enumerate them. The only distinguishing feature in the instant case is that the applicants are the workers. They are entitled to have exercised in their behalf the restraining power of the court when their legal rights are obstructed to the same extent as it has been exercised to protect the contractual rights of the employers.

It cannot be seriously contended that the plaintiffs

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have an adequate remedy at law. That the damages resulting from the alleged violation of the agreement would be irremediable at law is too patent for discussion. There are over 40,000 workers whose rights are involved and over 300 members of defendant organization. The contract expires within six months and a trial of the issues can hardly be had within that time. It is unthinkable that the court would force the litigants into a court of law. A court of equity looks to the substance and essence of things and disregards matters of form and technical niceties.

The motion is granted enjoining *pendente lite* defendants herein, their and each of their agents, servants and attorneys, and each and all of their several members, and every officer, director and representative of every corporate member thereof, and all persons acting in aid of or in conjunction with them, or any of them, including members of the said The Cloak, Suit and Skirt Manufacturers' Protective Association, from combining and conspiring in any way, to order, direct, instigate, counsel, advise or encourage the members of the Cloak, Suit and Skirt Manufacturers' Protective Association, or any of them, to cease performing or to violate the agreements of May 29, 1919, and June 3, 1921, made between the said The Cloak, Suit and Skirt Manufacturers' Protective Association and the International Ladies' Garment Workers Union and the Joint Board of Cloakmakers Union of the City of New York, and from doing or sanctioning any act in furtherance or support of such conspiracy; from ordering, directing, instigating, counseling, advising or encouraging such members of the said The Cloak, Suit and Skirt Manufacturers' Protective Association, or any of them, to abrogate and discontinue the provisions of said agreement for the system of week-work in their establishments prior

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to June 1, 1922, or to increase the hours of labor in their establishments above forty-four hours per week until the said 1st day of June, 1922; from supporting, aiding or assisting members of the Cloak, Suit and Skirt Manufacturers' Protective Association, or any of them, in any effort to abrogate the existing contract as to the week-work system or increase the labor hours in their establishments by money, contributions or in any other manner whatsoever; from expelling from membership in the said The Cloak, Suit and Skirt Manufacturers' Protective Association, fining or otherwise punishing, disciplining or discriminating against such members of the said association as may agree with the International Ladies' Garment Workers Union and the Joint Board of Cloakmakers Union of the City of New York, or either of them, to resume work in their establishments upon the terms as to the system of work, hours of labor or otherwise, of the agreements between the parties of May 29, 1919; from doing or continuing any act in furtherance of the conspiracy above set forth by means of speech, writing, meeting, or any other method, and from taking any steps whatsoever to put into execution or to retain in force and effect the aforesaid resolution of the said The Cloak, Suit and Skirt Manufacturers' Protective Association, adopted on the 25th day of October, 1921.

And from taking further action for the carrying out of said resolution or of any of the purposes thereof, and they are required to abrogate the same and to cease acting thereunder or under any similar resolution, or from taking or continuing in any concerted action involving the violation or repudiation of said agreement of May 29, 1919, or of any of the terms thereof.

Motion granted.

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Matter of the Estate of JABEZ A. BOSTWICK, Deceased.

(Surrogate's Court, New York County, January, 1922.)

Wills — bequest of part of residuary estate — direction as to payment of rents, issues and profits to widow and to son who predeceased mother leaving issue — conveyance and transfer of one-half of trust estate to son on arriving at twenty-one years of age — "death of my said son" refers to death either before or after mother — children of deceased son entitled to whole corpus of trust estate in equal shares — conveyance and transfer by trustee decreed.

Testator devised and bequeathed to a trust company one-third of his residuary estate in trust, with the following directions: To pay the rents, issues and profits thereof to his wife during her life, and upon her death to his son until he attains his majority, and thereafter during his life to pay him one-half of said rents, issues and profits; upon his arriving at the age of twenty-one years to convey, assign and deliver to him one-half of the trust estate, and "upon the death of my said son" to convey, assign and deliver all of the estate held in trust, be it the whole or one-half part thereof, to his lawful issue share and share alike or in default of such issue to his next of kin. The testator's widow survived him and though the son survived his father he predeceased his mother, leaving children him surviving. *Held,* that the words "upon the death of my said son" must be construed as referring to his death either before or after that of his mother.

The children of the deceased son are therefore entitled to the whole corpus of the trust estate in equal shares and the trustee will be directed under the will to make the proper conveyance and transfer.

That the son having reached his majority would immediately upon the death of his mother, the life tenant, have been entitled to one-half of the trust estate absolutely had he survived her, does not change the situation.

PROCEEDINGS upon the settlement of the accounts of a testamentary trustee.

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Geller, Rolston & Blanc, for accountant.

Lawrence Atterbury (Charles Green Smith, of counsel), for Marie S. Gilbert, individually and as executrix.

Alfred Frankenthaler, special guardian for Bostwick infants.

Charles D. Donohue, special guardian for Francis infants.

Jay & Candler, for Marie C. de Cartier as executrix.

Seacord, Ritchie & Young, for general guardians of Bostwick infants.

Winthrop & Stimson, for Egerton L. Winthrop, Jr., as executor.

COHALAN, S. This is a trustee's accounting, in which a question of construction has arisen by reason of the 4th paragraph of the will which disposes of the residuary estate.

The testator died in 1892, leaving a last will and testament which was admitted to probate in September, 1892. The 4th paragraph of the will directed this residuary estate to be divided into three parts. One of these parts is involved in the question of construction in this accounting. Subdivision 3 of the 4th pagagraph of the will reads as follows:

"3rd. Another of said equal third parts I devise and bequeath to the Farmers' Loan and Trust Company of the City of New York in trust to manage and protect the same and to receive the rents, issues and profits thereof, and to pay the same quarterly as they accrue to my wife Helen C. Bostwick during her nat-

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ural life and upon her death to pay the same quarterly as they accrue to my son Albert C. Bostwick, until he shall arrive at the age of twenty-one years and after he has attained said age to continue to pay the rents, issues and profits of one-half of said trust estate to my said son during his natural life, and upon the arrival of my said son at the age of twenty-one years to convey, assign and deliver one-half part of the said estate so held in trust to my said son, and upon the death of my said son to convey, assign and deliver all the estate then held in trust, be it the whole or one-half part thereof as aforesaid, to the lawful issue of said Albert C. Bostwick, share and share alike, or in default of such issue to the next of kin of said Albert C. Bostwick."

The testator's widow, Helen C. Bostwick, survived him and died on the 27th of April, 1920. Albert C. Bostwick, the testator's son, survived him but predeceased his mother, the life tenant. He died November 10, 1911. He left him surviving five children. He left a will in which Marie S. Gilbert is named as executrix. As such executrix she claims one-half of the corpus of the estate absolutely on the ground that Albert was over twenty-one years of age when he died and entitled to one-half of the principal of this trust fund, notwithstanding that he predeceased his mother, the life tenant. The accountant proposes to divide and distribute this entire fund to Albert's five children in equal shares and it is the opinion of the court that such proposed distribution is correct.

The fact that Albert, having reached his majority, would immediately upon the death of the life tenant have been entitled to one-half of the trust estate absolutely had he survived does not change the situation. He was not entitled to receive this one-half until after the death of his mother, the life tenant. As he died

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first, the one-half was never conveyed or assigned to him, nor did there exist in him any right to such assignment or conveyance while his mother lived. That part of the will never operated. The whole of this trust fund was still in the hands of the trustee, and under these circumstances the trustee is directed under the will to "convey and assign all of the estate then held in trust, be it the whole or one-half thereof to the living issue of Albert C. Bostwick, share and share alike." The words "upon the death of my said son" must be construed as referring to death either before or after his mother. The language obviously does so apply and covers the contingency which has actually resulted. The whole estate was still held in trust at the time of Albert's death, and it must all be distributed to Albert's children, share and share alike.

Decreed accordingly.

Matter of the Estate of GEORGE W. PARSONS, Deceased.

(Surrogate's Court, New York County, January, 1922.)

Wills — holographic — writing "this will revoked" across face of will effects neither a revocation nor cancellation — Decedent Estate Law, § 34.

After the death of a testator his holographic will executed nearly fifty years ago was found in a safe deposit box with the words "Will revoked" and "This will revoked," written vertically across the face of the will, in each instance followed by his name but not those of witnesses. *Held,* that admitting that the quoted words were written by the testator, of which fact there was no conclusive proof, they were ineffectual to work either a revocation or cancellation of the will under section 34 of the Decedent Estate Law.

Matter of Akers, 74 App. Div. 461; affd., 173 N. Y. 620, followed.

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PROCEEDING for probate of will.

Zabriskie, Sage, Kerr & Gray (George Zabriskie and George Gray Zabriskie, of counsel), for Protestant Episcopal Bishop of New York.

Alexander & Green (Daniel Whitford, of counsel), for Protestant Episcopal Bishop of Long Island.

John G. Daniel, for proponent.

COHALAN, S. A paper writing duly signed and executed by the above-named testator, dated March 1, 1873, has been filed for probate and the question is whether or not this will has been revoked or cancelled. The will was found in the testator's safe deposit box after his death, which occurred July 12, 1921. It is torn across horizontally in two places, but this tearing is obviously the result of age and wear, the tears being evidently caused by folding and creasing. The revocation or cancellation of the will is not predicated on the fact of these tears. It is based on the words written vertically across its face "Will revoked. Geo. W. Parsons," and "This will is hereby revoked. Geo. W. Parsons."

Section 34 of the Decedent Estate Law provides two methods for rendering a will which has been properly executed, null and void: *First*, that it shall not "be revoked, or altered, otherwise than by some other will in writing, or *some other writing* of the testator, declaring such revocation or alteration, and *executed with the same formalities* with which the will itself was required by law to be executed;" or *second*, "unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself."

The words on the face of the will show an attempt on

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the part of the testator to revoke the will by "some other writing of the testator" under the first part of section 34 of the Decedent Estate Law. There is no conclusive proof that the words were written by the testator. It is conceded that the writing resembles that of the will, which is holographic. The will was executed forty-eight years ago, and no proof is submitted that the testator had at all times sole access to it. Admitting, however, that the words were written by the testator, they are ineffective to work a revocation, because the statute has not been complied with in having the revocation "executed with the same formalities with which the will itself was required by law to be executed." There are no witnesses to the revocation.

Proceeding to the second part of section 34 of the Decedent Estate Law, there is no doubt that the will was not burned, torn, obliterated or destroyed; but was it cancelled? To "cancel" in its primary definition (Standard Dictionary) means "to mark out or off, as by drawing or stamping lines across to signify that it is to be omitted;" to draw lines across "something written so as to deface" (Century Dictionary); to "blot out or obliterate" (both dictionaries). "Cancellation" in its legal significance is defined (Bouvier L. Dict. [3d ed.] 416) as "The act of crossing out a writing. The manual operation of tearing or destroying a written instrument." It has been held that "there can be no such thing as a cancellation of an instrument, either as a physical fact or as a legal inference, unless the instrument itself is in some form defaced or obliterated." *Matter of Akers,* 74 App. Div. 461, 466; affd., 173 N. Y. 620. In the *Akers* case the will was holographic, as in this case, and it was written upon legal cap paper, which con-

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tained a marginal line to the left. In the blank marginal space and running lengthwise the testator had written the words, "This will and codicil is revoked. January 14/96," and under such words had affixed his signature. In that case none of the words of revocation was written across any of the writing of the will itself. The court held that there was no revocation or cancellation. That case was decided on the ground that an examination of the will disclosed the fact that there were no marks on the body of the will which in any way cancelled or obliterated it in any particular, stating that in the cases called to the attention of the court there has been a physical cancellation of some of the words of the will, accompanied by an intent to cancel. In this will before the court there is no obliteration. True the words are written across the face of the will instead of on the margin, as in the *Akers* case, but as there is no obliteration or blurring out of the context of the will, the same reasoning applies to the facts in this case as was applied by the court in the *Akers* case. The testator on this will has written and expressed an intent to revoke his will, but has failed to complete and carry out such intent by the physical act of obliteration or cancellation. The usual method of cancelling any writing is by drawing lines through it or otherwise striking it out. In this case there is an abortive attempt to revoke this will by "some other writing," ineffective under the first part of the statute to accomplish such result and unaccompanied by any obliteration sufficient to accomplish the result as a cancellation under the second part of the statute. In the *Akers* case the opinion states that "The great weight of authority is to the effect that a mere writing upon a will, which does not in any wise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancellation, *even*

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though the writing may express an intention to revoke or cancel." Such is the case in the will now before the court. This will is sought to be revoked by the testator solely by writing, and as it does not comply with the statute the revocation has failed. Failing of revocation by writing, reliance cannot be had on the words alone to effect a cancellation of the will. Such words must be disregarded when they are insufficient physically to accomplish this result.

I therefore hold the will has not been revoked or cancelled. Proceed accordingly.

Decreed accordingly.

FLORENCE M. TAPPIN, as Administratrix, etc., Plaintiff, *v.* ARTHUR E. MACLEAN, Defendant.

(County Court, Bronx County, January, 1922.)

County Court — jurisdiction — when judgment in excess of $2,000 may be entered.

Where the amount demanded by a complaint in a County Court is within the jurisdictional limitation, the jurisdiction to render judgment cannot be defeated by the fact that interest became due during the pendency of the action.

At the time a case in County Court was moved for trial, about ten years after the commencement of the action, and six years after the service of the answer, the sum demanded by the complaint, to wit, $1,959.20, amounted to $2,595.10 because of accrued interest. *Held*, upon a motion for judgment, the defendant not appearing, that plaintiff was entitled to judgment for the full amount demanded by the complaint, with interest to date.

MOTION by plaintiff for judgment, after proof.

M. S. Schector, for plaintiff,

No appearance for defendant.

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BAKER, Acting County Judge. The complaint in this action demands judgment for the sum of $1,600 with interest from the 17th day of August, 1911.

The action was commenced by the service of the summons and complaint on May 14, 1915. The answer was verified June 16, 1915.

The amount of the principal and interest, demanded by the complaint, was, at the commencement of the action, $1,959.20. This on December 23, 1921, when the case was moved for trial, amounted to $2,595.20.

The plaintiff, upon the failure of the defendant to appear at the trial, has made satisfactory proof of the cause of action and moves for judgment.

Has the County Court jurisdiction of the cause of action?

This is a court of limited jurisdiction and such limitation, in an action for the recovery of money only, is clearly restricted both by the Constitution and statute to actions "in which the complaint demands judgment for a sum not exceeding two thousand dollars." N. Y. Const. art. 6, § 14; Code Civ. Pro. § 340.

Thus, the amount demanded in the complaint is made the sole test of the property limitation of the power of the court in common law actions. *Halpern* v. *Langrock Bros. Co.*, 169 App. Div. 464; *Howard Iron Works* v. *Buffalo El. Co.*, 176 N. Y. 1.

Applying this test to the present action, we find at the time the action was commenced and the answer served, the amount demanded by the complaint was within the jurisdictional limitation. The power of the County Court to entertain the cause of action and render proper judgment was not and it would seem, could not *then* have been successfully questioned by the answer or otherwise.

The jurisdiction then obtained is continued unless the accrual of interest during the pendency of the action, which increases the amount in controversy to

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a sum exceeding two thousand dollars, has divested the court of the jurisdiction it possessed at the beginning.

It seems to be well settled that where circumstances are such as to vest jurisdiction at the time the action is brought, it cannot be ousted by any subsequent event and the judgment must be predicated on the state of things existing when the suit was commenced. *Knickerbacher* v. *Boutwell*, 2 Sandf. Ch. 319; *Koppel* v. *Heinrichs*, 1 Barb. 449; 15 C. J. 773.

It has been held that jurisdiction will not be aided by the fact that more interest became due during the pendency of the suit. *Knickerbacker* v. *Boutwell*, *supra*.

It must follow by analogy that jurisdiction cannot be defeated by such an event.

This is a wise and necessary rule, otherwise by accrual of interest during the pendency of the action, especially in courts with congested calendars where much time must elapse before a trial can be had, the amount in controversy could easily outgrow the jurisdiction of the court and the litigants would find further efforts barred from this court by limitation of jurisdiction and from other tribunals by limitation of time.

Where it has once acquired jurisdiction, there is no express or implied restriction on the County Court to try issues and render proper judgment. *Howard Iron Works* v. *Buffalo El. Co.*, 176 N. Y. 1; *Hawley* v. *Whalen*, 64 Hun, 550.

Having acquired jurisdiction the County Court may render any judgment or grant either party any relief which the Supreme Court might render or grant in a like case. Code Civ. Pro. § 348; *Howard Iron Works* v. *Buffalo El. Co.*, *supra*.

It was held in *Lewkowicz* v. *Queen Aeroplane Co.*, 207 N. Y. 290, that a legislative grant of power to the

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City Court of New York to enter judgment in favor of the plaintiff for an amount in excess of $2,000 conferred a greater jurisdiction than that possessed by the County Courts and was contrary to section 18 of article 6 of the Constitution.

But the standard which marks the maximum limit of the property jurisdiction of the City Court of New York is different from that which marks the limit of the County Court and the distinction has been repeatedly made of the courts.

In the City Court there is no limitation on the amount demanded in the complaint. This court has jurisdiction of any such action brought no matter how large may be the amount in controversy, but its final judgment in favor of the plaintiff is limited to $2,000. Code Civ. Pro. § 316; *Ralli* v. *Pearsall,* 69 App. Div. 254. But in the County Court there seems to be no limitation to the amount for which judgment can be rendered, while the amount demanded in the complaint is limited to $2,000. *Howard Iron Works* v. *Buffalo El. Co., supra.*

This distinction between the limitation based, in the City Court, on the amount for which judgment can be entered, and in the County Court on the amount for which judgment may be demanded, is clearly stated in the opinion of the Appellate Division in *Lewkowicz* v. *Queen Aeroplane Co.,* 154 App. Div. 155, and I do not understand that in affirming this decision, the Court of Appeals (207 N. Y. 290) states any rule differing from that of the Appellate Division or differing from the principles laid down in *Howard Iron Works* v. *Buffalo El. Co.*

I find the plaintiff entitled to judgment for the amount demanded in the complaint, with interest to date.

Judgment for plaintiff.

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TERMINAL & TOWN TAXI CORPORATION, Plaintiff, *v.* JOSEPH A. O'ROURKE, LAWRENCE J. MAHON and REPUBLIC AUTO REPAIRING COMPANY, Defendants.

(City Court of the City of New York, January, 1922.)

Lien Law, § 184 — conditional bill of sale given to secure purchase price of taxicab — lien for repairs superior to property rights of conditional owner.

Section 184 of the Lien Law does not contravene the due process of law provision of the State and Federal Constitutions.

One of the defendants, as security for the payment of the purchase price of a taxicab sold to him by the plaintiff, executed and delivered to it a conditional bill of sale which was duly filed according to law. Subsequently said defendant sold his right and interest in the taxicab to M., the other individual defendant. Three months after all of the purchase price had been paid, with the exception of $19, M. brought the taxicab to the place of business of the corporate defendant, and in writing authorized it to do some repairs and furnish new parts and agreed to pay therefor $500. Additional work was subsequently ordered by M., the cost of which was $75. In an action brought by the original vendor to recover possession of the car, which it had replevied from the corporate defendant, *held*, that irrespective of section 184 of the Lien Law said defendant was entitled to a lien for $575, which was superior to the property rights of plaintiff.

ACTION to recover possession of a chattel and to foreclose lien thereon. Submitted to court on agreed state of facts.

Cohen & Cohen, for plaintiff.

Modie Harris, for defendant Republic Auto Repairing Co.

CALLAHAN, J. Plaintiff brings this action to recover possession of a taxicab sold in February, 1920, to the

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defendant O'Rourke for $1,342.25, who executed and delivered to plaintiff as security for the payment of the purchase price a conditional bill of sale, a copy of which was duly filed in the office of the register of the county of New York as provided by law. O'Rourke subsequently sold his right and interest in the taxicab to the defendant Mahon. All of the purchase price had been paid April 20, 1921, with the exception of $19. On July 1, 1921, the defendant Mahon brought the taxicab to the place of business of the defendant Republic Auto Repairing Company, and in writing authorized said company to repair the taxicab and furnish new parts, for which he agreed to pay $500. Additional painting was subsequently ordered by Mahon, the cost of which was $75. Plaintiff thereafter replevied the car from the possession of the defendant repair company and brings this action for possession thereof. Defendant Republic Auto Repairing Company by counterclaim seeks judgment for the amount of its lien. The facts have been agreed to. The questions of law to be decided are: (1) Does section 184 of the Lien Law create a lien superior to the property rights and/or lien of a conditional vendor who has duly filed his conditional bill of sale at a time prior to that during which the garage-keeper's lien accrues, and (2) whether such section is unconstitutional as contravening the provisions of the State and Federal Constitutions providing that no person shall be deprived of property without due process of law.

Under the common law the lien of a repairman was given priority over that of a mortgagee by reason of the fact that permitting the mortgagor to remain in possession gave rise to an implication that the mortgagee had given him a right to make repairs which added additional value to the chattel and kept it in

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efficient condition for service. *Williams* v. *Allsup,* 100 E. C. L. 416; *Ruppert* v. *Zang,* 73 N. J. L. 216; 62 Atl. Repr. 998. On the other hand, the case of an agistment was held not to fall within the same principle for the reason that no additional value is conferred on the animal, the same only being fed. *Jackson* v. *Cummins,* 5 M. & W. 342; *Wallace* v. *Woodgate,* 1 Car. & P. 575. In fact, in the absence of special agreement, the common law gave no lien for the price or value of keeping horses. *Bissell* v. *Pearce,* 28 N. Y. 252. This agister's lien was later made statutory, and, being in derogation of the common law, was strictly construed. Accordingly, it has been held that one of the characteristics of such liens is that they are subordinate to all prior existing rights in the property. *Barrett Mfg. Co.* v. *Von Ronk,* 212 N. Y. 90. So also had it been held that a lien for storage is not superior to a lien of a mortgage. *Tucker* v. *Werner,* 2 Misc. Rep. 193; *Storms* v. *Smith,* 137 Mass. 201. Nevertheless, the law now seems to be that when this contractual lien became statutory and was in force when a mortgagee took a chattel mortgage on a certain truck sold to the mortgagor, it controlled the rights of the parties to the extent of giving the livery stable keeper who stored the same at the request of the mortgagor a lien prior to that of the mortgagee. *Barrett Mfg. Co.* v. *Von Ronk, supra,* p. 95. So, also, in *Corning* v. *Ashley,* 51 Hun, 483; affd., 121 N. Y. 700, where the owner of a horse, having given a chattel mortgage to secure the debt, subsequently placed the horse with the plaintiff for care and pasture, the court held that as the statute creating the lien was in force at the time the mortgage was given, the mortgagee was chargeable with knowledge thereof; that in a certain sense the provisions of the statute entered into the contract of mortgage and that

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such mortgage could not deprive the agister of the benefit of the statute. In contrast with the contractual or statutory liens, common-law liens, which are founded upon principles of justice and considerations of policy, attach to the property itself without reference to ownership, and are superior to and override all other rights. *Barrett Mfg. Co.* v. *Von Ronk, supra; Sullivan* v. *Clifton,* 55 N. J. L. 324; 26 Atl. Repr. 964. We thus find that the statute, so far as repairs are concerned, is merely declaratory of these common-law rights. The principles of the common law therefore govern, and, irrespective of the statute, the defendant repair company's lien must be held superior to that of the plaintiff owner. As the statute was in force at the time of the execution and delivery of the conditional bill of sale, the vendor is chargeable with knowledge thereof, and impliedly made its provisions a part of the contract. *Barrett Mfg. Co.* v. *Von Ronk, supra; Corning* v. *Ashley, supra.* Ownership of the chattel is not necessary, rightful possession by the conditional vendee manifesting implied authority by the owner to the making of the necessary repairs. *Ruppert* v. *Zang, supra.* Other cases in point are *Johanns* v. *Ficke,* 224 N. Y. 513, and *Wolfman Co.* v. *Eisenberg,* 116 Misc. Rep. 43. The statute is constitutional. Similar enactments have been so held. *Waters & Co.* v. *Gerard,* 189 N. Y. 302; *Monthly Instalment Loan Co.* v. *Skellet Co.,* 124 Minn. 144; *Watts* v. *Sweeney,* 127 Ind. 116. The defendant Republic Auto Repairing Company, Inc., is entitled to a lien for the sum of $575, and judgment is granted accordingly. Submit findings on notice.

Judgment accordingly.

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ALEXANDER SMITH COCHRAN, Plaintiff, *v.* ISIDORE SCHERER, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Ninth District, January, 1922.)

Municipal Court of the city of New York — Rules of Civil Practice apply — action for rent — insufficient denial under Municipal Court Code, § 92 — answer alleged lease procured by fraud — tenant did not surrender possession of premises — motion for summary judgment under rule 113 of Civil Practice Rules granted — Municipal Court Code, § 15.

By section 15 of the Municipal Court Code the Rules of Civil Practice apply to the Municipal Court of the city of New York and no provision of the Judiciary Law is inconsistent with such application.

In an action brought in the Municipal Court of the city of New York to recover rent for the last three months of 1921 under a written lease executed in November, 1920, the defendant both in his original and in his amended answer denied "each and every allegation of the complaint excepting that he admits he is in possession of the premises described in the complaint." *Held*, that under section 92 of the Municipal Court Code such denial was insufficient to raise the question of the validity of the lease, particularly where in a separate defense the defendant expressly admits that he executed the lease, entered into the occupation and possession of the premises and paid rent from December 1, 1920, to November 1, 1921.

Alleged false and fraudulent representations by plaintiff that no building or structure would be built upon the vacant lot in the rear of the leased premises during the period of defendant's lease, were pleaded in a separate defense and following a statement that said representations were relied upon by defendant, it was further alleged that after the making of the lease a structure, the new addition to the Plaza Hotel, etc., was built upon said vacant lot, the wall of which projected far above the windows in defendant's apartment and so near as to cut off light and air and shut off the view. *Held*, that if defendant because of the alleged false and fraudulent repre-

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sentation desired to repudiate or rescind the lease he should have, on discovery of the alleged fraud, promptly surrendered possession of the premises.

Upon a motion made by plaintiff after the Civil Practice Act and the Rules of Civil Practice took effect, to strike out the answer and for summary judgment under rule 113 of said rules, the defendant in his supporting affidavit gave his version of a conversation with an employee of plaintiffs' agent concerning the terms of the lease and as to the possibility of a building being erected in the rear of the leased premises. *Held,* that the motion for summary judgment must prevail, it being apparent from the undisputed facts that upon no theory of law could the defendant sustain his alleged defense.

MOTION by plaintiff for order striking out answer and for summary judgment.

Henry S. Goodspeed, for plaintiff.

Clarence E. Sutherland, for defendant.

LAUER, J. This is a motion made on behalf of the plaintiff for an order striking out the defendant's answer and for summary judgment in favor of the plaintiff against the defendant pursuant to rule 113 of the Rules of Civil Practice. Before considering the merits of the motion and the sufficiency of the defense as presenting an issue, the question is presented as to whether the Rules of Civil Practice apply to the Municipal Court.

Under the provisions of section 15 of the Municipal Court Code it would seem that there could be no question about this, and there would be no doubt about it but for the decision in the case of *Mitchell* v. *Schroeder,* 94 Misc. Rep. 270; affd., 174 App. Div. 857, which interpreted that section and apparently limited its application.

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Section 15 of the Municipal Court Code provides: "Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding."

I have never personally been in accord with the reasoning of that decision or the interpretation which has been given to section 15 by reason thereof. I believe that the appellate court in reaching the determination in that case did not have before it controlling authority holding to the contrary. A distinction is drawn in that case between the inherent power of the Supreme Court and the conferred or statutory power of the Supreme Court. However, I believe that the provisions of the present Civil Practice Rules are applicable even under the limitations placed upon section 15 by the case cited. Undoubtedly the legislature had the right to change the practice in the Municipal Court if it so desired. The legislature did this very thing by the passage of a law which provided (Laws of 1920, chap. 902), for a convention "to formulate and adopt suitable rules of practice not inconsistent with the judiciary law nor with the civil practice act, adopted by this legislature, *which shall be binding upon all the courts in this state and all the justices and judges thereof,* except the court for the trial of impeachments and the court of appeals."

I know of no provision in the Judiciary Law which is inconsistent with the application of the Civil Practice Rules adopted by the convention to the Municipal Court, and the Civil Practice Act by section 1 provides that the act "except as otherwise expressly provided, shall apply to the civil practice in *all the*

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courts of record of the state." The present motion was instituted after October 1, 1921, when the Civil Practice Act and Rules took effect and, therefore, I see no reason why Civil Practice Rule 113 should not apply. This rule provides, "when an answer is served in an action to recover a debt or liquidated damages arising, 1. on a contract, express or implied, sealed or not sealed; 2. on a judgment for a stated sum; the answer may be struck out and judgment entered thereon on motion, and the affidavit of the plaintiff or of any other person having knowledge of the facts, verifying the cause of action and stating the amount claimed, and his belief that there is no defense to the action; unless the defendant by affidavit, or other proof, shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend."

The present action is brought to recover rent for the months of October, November and December, 1921, under a written lease executed on November 13, 1920, between the plaintiff and the defendant. The defendant by his original answer and also by his amended answer denied "each and every allegation of the complaint excepting that he admits he is in the possession of the premises described in the complaint." This denial is not sufficient, under the provisions of section 92 of the Municipal Court Code, to question the validity of the lease alleged in the complaint. Besides, in the separate defense of the answer the defendant expressly admits that he executed the lease alleged in the complaint and entered into the occupation and possession of the premises and paid the rent from December 1, 1920, to November 1, 1921. The defendant alleges that prior to and at the time of the making of the lease the premises in the rear of the apartment

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leased to the defendant was vacant and the defendant had light, air and access to his apartment and an unobstructed view to Fifty-eighth street in the rear of the leased premises which were on Fifty-ninth street, and the defendant alleges that his apartment was "bright, cheerful, and in which the sun shone during the daylight hours, and artificial light was unnecessary." The defendant further alleges that the plaintiff "falsely and fraudulently represented and stated to the defendant that the said premises in the rear of said demised premises would remain vacant and no improvement or building would be built thereon during the period of this lease;" and further, "that plaintiff would guarantee and assure the defendant that no building or structure would be built upon such vacant lot during the period of said lease and that the light, air and access and view from the said demised premises would remain unobstructed during the term of said lease." The defense then states in the answer, that these representations were false and were relied upon by the defendant, and then the defendant alleges that "thereafter and on or about the 13th day of November, 1920, a building or structure was built upon said vacant lot, which projected far above the windows in defendant's apartment and the wall of which was near to the defendant's windows, and thereby obstructed the light, air and access to the defendant's apartment, and shut off the view from his windows and the apartment became dark and unhealthy, and had to be lighted by artificial means at all times." The defendant further then alleges that he "elected to remain in the premise and recover damages for the fraudulent acts of the defendant herein" and that the defendant has been damaged $1,000, "the difference between the present value and the rent reserved in the lease."

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As a further and separate defense under the second counterclaim he substantially realleges the matter set forth in the first defense and counterclaim which I have just outlined, but alleges that it was a warranty and representation and asks damages for $1,000. In his supporting affidavit on this motion the defendant gives his version of a conversation between an employee of Pease & Elliman, the landlord's agents, concerning the property and the terms of the lease as follows: "Deponent's wife asked this person whose name is unknown to deponent, if there was a possibility of a building being built in the rear of the demised premises and the said agent said that there was no such possibility and deponent's wife then said that she would not take a lease to the apartment if a building should be built in the rear of the apartment and cut off the light and air, and the agent then replied that we can assure you and guarantee you that your light of the apartment will never be cut off as long as you stay there, and there will be no building done in the rear of the apartment during the term of the lease. Thereupon defendant's wife replied that they would rely upon that statement and take the lease and the agent said it was all right and thereupon deponent signed the lease and paid the rent." Assuming this statement to be true and the best that the defendant could establish on the trial, it is quite apparent that a conversation such as took place before the lease was signed would be incompetent as evidence for the purpose of varying the terms of the contract, the lease in question. As proof of any fraudulent representation it is also insufficient. It is a proposition firmly established in the law that a misrepresentation as to a fact not yet in existence or as to something that has not happened or occurred, but merely a misrepresentation as to a future event that may or may not occur, can

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form no basis of actionable fraud. 14 Am. & Eng. Ency. of Law (2d ed.), p. 33, c. 47, and cases there cited. To constitute actionable fraud, the false misrepresentation "must relate to some material past or existing fact."

The facts further appear that the defendant is still in possession of the premises. If he desired to claim fraud and for that reason repudiate or rescind the lease, he should have promptly on the discovery of the fraud surrendered possession of the property. This, however, the defendant failed to do but continued in the physical possession of the premises long after the alleged fraud was discovered.

The defendant's supporting affidavit shows that "a building was thereafter erected on said premises in or about the spring of 1920, as near as deponent can remember." The building that he refers to is the new addition of the Plaza Hotel on Fifty-eighth street. The answer in paragraph eight alleges that on or about the 13th of November, 1920, a building or structure was built on the vacant lot, but the lease was only made on the 13th of November, 1920, the term to commence on the 1st of December, 1920. What the defendant probably intended to allege was that the building was erected in the spring of 1921. In any event, the defendant remained in possession according to the undisputed facts and paid rent monthly to October 1, 1921.

As was said by Judge McLaughlin in the case of *Levy Leasing Co.* v. *Siegel,* 230 N. Y. 634: "A party cannot rescind while retaining the fruits of the contract. In the case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession."

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It seems to me quite apparent from the undisputed facts that on no theory of law can the defendant sustain the facts as they are made to appear from the papers upon this motion for summary judgment. It follows, therefore, that the plaintiff's motion for judgment under section 113 of the Civil Practice Rules must prevail.

Judgment for plaintiff.

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MEMORANDA

OPINIONS NOT OTHERWISE REPORTED.

GEORGE DERRICK, Claimant, *v.* STATE OF NEW YORK.

Claim No. 14359.

(Court of Claims, January, 1921.)

Damages — permanent appropriation of land for Barge canal — canal constructed on both sides of the road on which claimant's hotel property is situated — no invasion of property — consequential damage is damnum absque injuria — Laws of 1918, *chap.* 612, *not applicable — an award made for appropriation of highway in front of claimant's premises — filing of notice of intention unnecessary — Code Civ. Pro.* § 264.

CLAIM for damages for appropriation of land.

Michael J. Larkin, for claimant.

Frank K. Cook, deputy attorney-general, for State of New York.

CUNNINGHAM, J. This claim is for damages alleged to have been sustained by the claimant on account of permanent appropriations of lands by the state of New York for the Barge canal. Pursuant to the Barge Canal Act (Laws of 1903, chap. 147), notices of appropriation and maps were served on certain persons and on the town of Verona, owners of the fee of the lands appropriated. None was served on the claimant. This claim was filed under chapter 640 of the Laws of 1915.

The claimant was the owner of premises situate on the west side of the Cheese Factory road, so called. He conducted a licensed hotel there. At a point about

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150 feet north of the claimant's premises, the state appropriated land for the Barge canal, and constructed the canal across the Cheese Factory road, cutting it off at that point. Further, the state, for the same purpose, appropriated the easterly half of the Cheese Factory road, being the half opposite the claimant's premises. Claimant's title ran to the center of this road. It appears, however, that the state actually never has closed or made any physical change in the half of the road so appropriated. Also the state built a new bridge across the Barge canal at a point about 100 feet from the intersection of the Barge canal with the old road which was cut off, and built new roads to said bridge on each side of the canal. The new highway to the bridge near claimant's premises was on a higher grade than the claimant's lands and the Cheese Factory road. This highway approach to the bridge was not on or abutting claimant's premises.

There are three alleged bases for this claim: (1) that the grade and level of the new highway approach to the bridge is at an elevation considerably higher than the surrounding land, and particularly, the claimant's premises; (2) that the cutting off of the Cheese Factory road, as above described, by the Barge canal has lessened or prevented access and traffic to or from the territory beyond the point of severance; and (3) that the appropriation by the state, for the purpose of the Barge canal, of the easterly half of the Cheese Factory road in front of the premises of the claimant was a taking of property of the claimant for which compensation must be made.

No authority is cited to us for the contention that liability follows construction by the state of the new highway approach to the bridge at an elevation higher than claimant's premises in the vicinity. This highway approach to the bridge was built on lands owned by the state, and was not next adjacent to claimant's

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premises. There was no invasion or taking of the claimant's property, and no negligence is alleged or proved in the work done. If there has been any consequential damage to the claimant by reason of the grade at which the new road was built, it is *damnum absque injuria. Matter of Grade Crossing Commissioners,* 46 App. Div. 473; affd., 166 N. Y. 69. The provisions of chapter 612, Laws of 1918, do not apply to this situation. The statute refers only to *changes* of grade of a street or highway. The claim involves a new highway, not an old one whose grade has been altered.

Nor is the state liable to claimant for the incidental damage which may have accrued to him by reason of the lessened use of the Cheese Factory road, due to the cutting off by the Barge canal of that road as described. This principle was asserted and applied in the case of *Charlotte A. Bingham* v. *State of New York,* No. 14106, decided in January, 1918; affirmed unanimously, 186 App. Div. 930, in which no opinion was written. This court found, as a conclusion of law, that the claimant would not be entitled to an award even though she suffered damage " by reason of the diversion of the traffic from her place as complained of, because said damages, if any, would be *damnum absque injuria.*" This is in accordance with the principle of various cases determined heretofore by our courts. *Matter of Grade Crossing Commissioners, supra; Fearing* v. *Irwin,* 55 N. Y. 486.

However, the state is liable to the claimant for the appropriation for Barge canal purposes of that portion of the highway in front of his premises. This principle was discussed by us at length in the case of *Weaver* v. *State of New York,* 12 St. Dept. Rep. 8, and by the Appellate Division in *Brooks* v. *State of New York,* 189 App. Div. 24. In the *Weaver* case, part of the highway adjacent to claimant's premises was appropriated by the state for Barge canal purposes, and

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we determined that the state was liable therefor, saying: "She is the owner of the right to uninterrupted light, air and access to and from the highway and to have the same and all parts of it remain open, unoccupied, and unobstructed for use and enjoyment as a highway. Her property right is infringed and invaded by any act which subjects the highway to any burden, change or interference amounting to the appropriation, possession or occupation of the highway, or any portion of it, to the special, continuous and exclusive use of the State, a corporation or individual, or in a manner inconsistent with its full and free use and enjoyment for travel and the usual purposes of a public highway. For that reason the courts of this State have afforded to the abutting owner proper compensation when his property right in the street has been invaded or taken by the erection of an elevated railway or of telephone poles within the limits of a public highway in front of his premises. (*Story* v. *New York Elevated Railroad Co.*, 90 N. Y. 122, 156–160, 173; *Eels* v. *A. T. & T. Co.*, 143 id. 133.)"

Of course, the *Weaver* case and the *Brooks* case involved that part of the highway immediately in front of the claimant's premises, and it was to that portion of the highway the opinions mentioned referred. In all parts of the highway in front of the claimant's premises, this claimant had a property right. Its appropriation by the state for canal purposes was a destruction and taking of that property right, for which the claimant must be compensated. *Egerer* v. *New York C. & H. R. R. R. Co.*, 130 N. Y. 108; *Abendroth* v. *Manhattan Railway Co.*, 122 id. 1; *Matter of Mayor, etc., New York* (*Walton Avenue*), 131 App. Div. 696, 713; affd., 197 N. Y. 518.

The claimant's right to compensation is not affected by the fact that no physical destruction or change of the appropriated portion of the highway has occurred as yet. *Matter of Mayor, etc., New York*

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(*Walton Avenue*), *supra*. Nor was it necessary in this case to file a notice of intention. This is an appropriation claim within the provisions of the statute, making such notice unnecessary. Code Civ. Pro. § 264; *Oswego & Syracuse Railroad Company* v. *State of New York*, 226 N. Y. 351.

The claimant is entitled to an award, pursuant to the principles mentioned, in the sum of $200.

ACKERSON, P. J., concurs.

Ordered accordingly.

CHARLES MARSH, JR., and Another, Claimants, *v.* STATE OF NEW YORK.

Claim No. 14361.

(Court of Claims, January, 1921.)

Damages — to owner whose title extends to center of street wholly appropriated by state for Barge canal purposes — claim allowed.

CLAIM for damages caused by appropriation of land.

Michael J. Larkin, for claimants.

Frank K. Cook, deputy attorney general, for the State of New York.

CUNNINGHAM, J. The claimants were the owners of ten and seventy-four one-hundredths acres of land abutting on Mill street in the city of Rome, their title extending to the center line of the street. The state appropriated for Barge Canal purposes, under the authority of the Barge Canal Act (Laws of 1903, chap. 147), all of Mill street in front of a large part of the claimants' premises. Notice of the appropriation prescribed by the statute was served on the city of Rome; none was served on the claimants. The state destroyed the street, and then located and constructed a new and

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improved Mill street nearby and running in the same general direction. The state transferred trolley tracks, formerly on another street, to the site of the original Mill street, thus placing them between the new Mill street and claimants' premises. The latter was very valuable, being in that section of Rome which, in recent years, has witnessed very rapid and extensive industrial development.

As a result of the physical changes which followed, access to that part of their property can be had only over the tracks and the site of old Mill street. It is unnecessary to discuss the principles involved at length. Our opinions in *Weaver* v. *State of New York*, 12 St. Dept. Rep. 8, and in *Derrick* v. *State of New York*, 117 Misc. Rep. 773, are clearly determinative of this claim. The claimants' right to damages for this appropriation is beyond cavil. Their rights in Mill street, as defined in the *Weaver* and *Derrick* cases, have been appropriated for barge canal purposes by the state and utterly destroyed.

An award in the sum of $1,500 is made to the claimants.

ACKERSON, P. J., concurs.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* MARGARET FUNK, Appellant.

(County Court, Erie County, April, 1921.)

City Court of Buffalo — power to order restitution after conviction for petit larceny — Code Crim. Pro. §§ 483(2), 768 — new trial ordered.

APPEAL from judgment of conviction.

Ernest W. McIntyre, for appellant.

Carlton J. Townsend, for respondent.

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NOONAN, J. The appellant, Margaret Funk, was formerly employed by Goold Brothers, Inc., dealers in pianos and musical supplies, and it is claimed that on October 22, 1919, she stole from her said employers three dollars and eighty cents, the proceeds of a sale. Thereafter she was arrested for petit larceny, tried in the City Court of Buffalo on November 28, 1919, and, after several adjournments granted for the purpose of permitting the probation officers to investigate the case, and also to determine what was the best disposition to be made of it, she was found guilty on December 30, 1919, and placed on probation for one year and ordered to make restitution in the sum of $1,500.

At the trial she was represented by able counsel, and after she was placed on probation she made some payments to the City Court, but on January 30, 1920, she employed her present attorney, who appealed her case to this court, and he asks for a reversal of the judgment of conviction on the ground that evidence was improperly admitted by the trial court, that it is contrary to the weight of the evidence, and that the order to make restitution be vacated because the City Court had no power to make it.

I understand, although it is not a part of the record, that between the day of the trial and the day of sentence, Goold Brothers, Inc., after a careful investigation, determined that the appellant had taken at least $1,500 in various petit larcenies extending over a considerable period of time, and that this fact and also the fact that the appellant promised to make the restitution if she did not receive a prison sentence, were both taken into consideration by the trial judge in disposing of the case.

Under ordinary circumstances the judgment of conviction would be affirmed because it is warranted by the evidence, but the City Court had no power to make restitution for more than three dollars and eighty cents under section 483, subdivision 2, of the Code of Crim-

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inal Procedure, which provides that the court can order the defendant "to make restitution or reparation to the aggrieved parties in an amount to be fixed by the court, *not to exceed* the actual losses or damages caused by his offense." I take it that the words "his offense" mean only the offense for which the defendant is on trial before the court, and cannot be stretched to cover similar offenses committed by the defendant against the same party or various parties. I know that this construction of the statute greatly hampers its usefulness in disposing of cases of similar character in the City Court, but I cannot make the statute other than it is.

Under all the circumstances I think that the proper thing to do is to reverse the judgment of conviction, and send the case back to the City Court for a new trial, pursuant to the provisions of section 768 of the Code of Criminal Procedure, and an order may be entered accordingly.

Judgment reversed.

NICHOLAS SPARANDERA, an Infant, by GABRIELE SPARANDERA, his Guardian ad Litem, Plaintiff, *v.* STATEN ISLAND GARAGE, INC., Defendant.

(Municipal Court of the City of New York, Borough of Richmond, June, 1921.)

Contracts — infant on disaffirmance of executed contract for purchase of an automobile must restore what he received under the contract — restoration only in part — must account for reasonable use of vehicle including deterioration in value — an alleged assignment of all rights of the seller under the contract and chattel mortgage given on the sale, unsupported by proof, must fail — complaint dismissed.

ACTION by infant for return of money paid on account of purchase of automobile.

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Prosper R. Ferrari, for plaintiff.

Joseph B. Handy, for defendant.

WEDEMEYER, J. Plaintiff seeks to recover in this action the amount of moneys paid by him, upon a certain contract entered into between the parties hereto, on September 29, 1920, wherein plaintiff, then an infant over twenty years of age, agreed to purchase a certain motor vehicle known as a Ford runabout, together with certain accessories appurtenant thereto.

The contract price, including war tax, freight and fuel, was $524.88, and the amount of the accessories purchased, including charges for fire and theft insurance, covering said automobile for one year, was $181.34, or a total purchase price of $706.22. On this last mentioned amount plaintiff paid to the defendant the sum of $235.46 on September 29, 1920, the date of the delivery of automobile and accessories in question; and for the balance of said purchase price, amounting to $470.76, plaintiff executed and delivered to defendant his twelve certain promissory notes in writing, each for the sum of $39.23, the payment of which was secured by a chattel mortgage given by plaintiff to defendant upon the said automobile.

Subsequently at the office of the Commonwealth Finance Corporation, at 100 Broadway, borough of Manhattan, plaintiff paid three monthly instalments of $39.23 each, during the latter part of the months of October, November and December, 1920, in payments of notes then due, aggregating the sum of $117.69. The amount, time and place of each payment made by the plaintiff were in accordance with his paper writing evidenced by defendant's exhibit C.

It is conceded that plaintiff purchased from and paid the sum of $5 to the defendant for a new horn for his automobile. The total payments made by plaintiff under his contract, including the horn,

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amount to $358.15. The automobile from the date of its purchase on September 29, 1920, to February 28, 1921, a period of five months, was in the possession of plaintiff. By the undisputed allegations contained in the complaint it appears that prior to the commencement of this action plaintiff rescinded the contract under consideration and demanded the return of the amount of moneys paid on account thereof, and tendered the said automobile to defendant, which demand and tender were refused by the latter; and it further appears in the complaint, undenied by answer, that at the time of the disaffirmance of the contract "plaintiff duly notified defendant that at the time of the making of said contract of purchase that he was an infant and that he elected to rescind the said alleged contract and that he deemed the same void."

Defendant resists plaintiff's claim for a recovery herein, as disclosed by its answer, upon the following grounds:

(a) That plaintiff is estopped from pleading his infancy on the ground of his written representation made to the defendant that he was twenty-one years of age;

(b) That an infant cannot recover upon an executed contract; and

(c) That at the time plaintiff tendered the automobile to defendant it had deteriorated in value, and was not of the same value as when sold to the plaintiff; and that the reasonable value of the use of said property from the time of the sale thereof on September 29, 1920, to the tender made as aforesaid, was $500, an amount which is in excess of the sum paid by plaintiff on the contract in question.

With reference to the first alleged defense urged by the defendant that the plaintiff is estopped from pleading his infancy because he represented in a certain written or printed statement, given for the pur-

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pose of securing credit in connection with plaintiff's purchase of the property aforesaid from the defendant, that he was twenty-one years of age when he signed it, cannot be supported in the case at bar. The doctrine of estoppel is rarely if ever applied to infants. The action at bar is on contract, not in tort. There is no allegation or suggestion of false representation or fraud in the complaint, except that the defendant in its answer sets forth that the plaintiff represented in writing his age as being twenty-one years. In the case of *International Text Book Company* v. *Connelly*, 206 N. Y. 188, at foot of page 196, Judge Vann, writing the opinion for the court, stated, which applies with equal force in this case, as follows: "While an infant is liable for his torts the action must rest solely on the wrong committed by him. The complaint in this action rests wholly on the written contract which is set forth at length," and the fact that the written statement contains the representation as to age "with neither allegation nor proof that it was made with intent to defraud, does not 'fix the character of the action as one *ex delicto*.' (*Sparman* v. *Keim*, 83 N. Y. 245.) It is well settled in this state that in an action upon a contract made by an infant he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him. (*Studwell* v. *Shapter*, 54 N. Y. 249; *N. Y. Building Loan Banking Co.* v. *Fisher*, 23 App. Div. 363; *Brown* v. *McCune*, 5 Sandf. Super. Ct. 224.)"

The remaining questions, presented by the defendant in his answer, will be considered together. The courts of this state have held that a contract such as in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future. In so far as the payments made are concerned the contract was in a sense executed for

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nothing further remained to be done with reference to those payments. *Rice* v. *Butler,* 160 N. Y. 578, 582. In the case of *Beardsley* v. *Hotchkiss,* 96 N. Y. 201, 211, it is stated: "It may now be regarded as the settled doctrine that the contracts of an infant are not absolutely void, but only voidable. As to contracts purely executory it must be shown that the infant ratified them after he became of age before they can be enforced against him. As to contracts executed, such as deeds of land or conveyances of personal property, they will generally be deemed to be ratified, and will thus become just as valid and effectual as the contracts of an adult, unless they be disaffirmed by the infant before he arrives at age, or within a reasonable time thereafter." See, also, *Chapin* v. *Shafer,* 49 N. Y. 407; *Sparman* v. *Keim, supra.*

It is thus settled in this state that an infant may rescind an executed contract made by him either during minority or within a reasonable time after he arrives of age, and need give no reason for his refusal to continue to carry out an agreement made by him. *Danziger* v. *Iron Clad Realty & Trading Co.,* 80 Misc. Rep. 510.

The contract in the case at bar was voidable and the plaintiff rescinded it as he had a right to do. The right of an infant to avoid or rescind contracts is based on the incapacity to contract. However, where an infant disaffirms his contract, as in this case, he must restore or offer to restore to the party with whom he contracted what he received thereunder. *Rice* v. *Butler, supra; Lown* v. *Spoon,* 158 App. Div. 900; *Mutual Milk & Cream Co.* v. *Prigge,* 112 id. 652, 653; *Pierce* v. *Lee,* 36 Misc. Rep. 870, and *Crummey* v. *Mills,* 40 Hun, 370. In the case of *Lown* v. *Spoon, supra,* the court stated: "It has become the settled law in this State that the privilege of infancy may be

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used as a shield to protect the infant and not as a sword to inflict injuries upon another. If an infant has had the benefit of a contract sought to be rescinded by him, he must account for the benefit or return its equivalent. * * * Kent, in his Commentaries (Vol. 2, p. 240) says: 'If an infant pays money on his contract and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other.'"

It is conceded that upon the disaffirmance of contract by plaintiff he tendered the automobile to defendant but failed to restore or offered to restore the tire and tube and such amount of fuel as were delivered to him by the defendant at the time of the making of the agreement aforesaid. The evidence indicates that plaintiff had possession of the property, which was the subject of the contract, from September 29, 1920, to February 28, 1921, during which time the plaintiff used the automobile. It is manifest that the use of the automobile must have greatly deteriorated its value. "Making full satisfaction for the deterioration of the property arising from its use, is doing no more. Presumptively, he derived from the use of the property a profit, or benefit, equivalent to such deterioration." *Gray* v. *Lessington*, 2 Bosw. 257. As the plaintiff has received the benefit of the contract, having had the use of the property in question, during a period of five months, he must, in view of the doctrine now well recognized in this state, account for its reasonable use or deterioration in value. Otherwise, he would be making use of the privilege of

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infancy as a sword, and not as a shield. In the absence of wanton injury to the property the value of the use would be deemed to include the deterioration in value. *Rice* v. *Butler, supra.* In addition to the cases previously cited this principle is also supported in *Wheeler & Wilson Manufacturing Company* v. *Jacobs,* 2 Misc. Rep. 236, and *Wanisch* v. *Wuertz,* 79 id. 610.

Under the uncontradicted evidence in this case it appears that the reasonable value of the use of the automobile during the time intervening between the purchase of the property and its return, was $375, which is at the rate of $75 per month for five months, which total sum not only equaled but also exceeded the amount which plaintiff paid on account of the purchase price. Furthermore it appears uncontradictedly that the automobile had materially depreciated in value, and that the total value of all property tendered by plaintiff was only $250. Deducting this last mentioned amount from the total purchase or contract price of $706.22 leaves the sum of $456.22, representing the depreciation of the property in question. This latter amount also exceeds the total payments made by plaintiff on account of the contract.

It is claimed by the plaintiff that no allowance for the value of the deterioration or reasonable value of the use of the automobile should be made in favor of the defendant as against the plaintiff, upon the ground that the plaintiff had no use of the automobile nor derived any benefit therefrom. Plaintiff testified that he had used the automobile but four or five times and that when in use he claimed that "it wasn't running right." Of this condition plaintiff notified defendant. There is no evidence, nor does the plaintiff assert, that the automobile was mechanically defective in any respect.

Plaintiff is not an automobile mechanic and was

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unable to assign any reason for the condition he complained of. However, it appears from the testimony of Hansen, an employee and witness for the defendant, that plaintiff informed him on two or three different occasions that the automobile was not "running," but that after each inspection he found nothing the matter with the mechanism of the automobile; witness further testified that when he drained the oil from the motor and replaced it with the grade of oil suitable for that type of motor, he could always start it without any trouble. Plaintiff had been informed of the grade of oil that should be used in the motor. The oil used by the plaintiff in his motor was "too heavy," which appears to be the only reason assigned for the automobile not "running," as plaintiff claimed. Thus, it appears that the matters complained of were not occasioned through any fault of the defendant. In view of the facts aforesaid, plaintiff's contention is not well founded.

Furthermore, it is contended by the plaintiff that the defendant, on September 29, 1920, transferred to the Commonwealth Finance Corporation, all its right, title and interest in and to the contract and chattel mortgage in question, and that by reason thereof this defendant is not now in a position to seek an allowance for the value or the deterioration or use of the automobile. This contention as to the assignment is not supported by any legal proof. A careful review of the evidence in this case fails to disclose any assignment of the matters referred to by the plaintiff prior to the commencement of this action, or at any time. The mere fact that three payments were made by plaintiff at the office of the Commonwealth Finance Corporation does not establish an assignment. In the absence of proof it is presumed that such payments were made for the benefit of the defendant and pursuant to the terms set forth in defendant's Exhibit C,

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which is in effect a promissory note for $470.76, payable in monthly instalments of $39.23 each. The indorsement on the back of the last mentioned exhibit is not an assignment of defendant's rights acquired under the contract and chattel mortgage made with the plaintiff. Furthermore, no assignment of the character asserted by plaintiff is conceded by defendant; and in the absence of any proof of the assignment as alleged aforesaid the presumption is that the rights acquired by the defendant under the contract and chattel mortgage aforesaid are still vested in the defendant, and by reason thereof this defendant is now in a position to assert his claim for an allowance for the value of the deterioration or use of said automobile during the period the infant had possession of said property.

When the aforesaid indorsement was made, whether before or after the commencement of this action, does not appear; nor is it apparent from the evidence whether the said promissory note, with the indorsement thereon, was ever delivered to any party by the defendant, and if so the time of such delivery does not appear. Furthermore assuming, but not finding, that defendant's Exhibit C was indorsed and transferred over to the Commonwealth Finance Corporation on September 29, 1920, such transfer would only operate as an assignment of the rights of the defendant which it then had in and to the said promissory note, but would not operate as an assignment of the rights of the defendant acquired under the contract or chattel mortgage. In the absence of proof respecting the matters herein referred to, the claim of the plaintiff herein made with respect to the alleged assignment must fail.

In view of the authorities hereinbefore cited and the findings of the court made herein, it must follow that the complaint should be dismissed.

Judgment accordingly.

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STOWELL MOTOR CAR COMPANY, INC., Plaintiff, *v.* ELIZABETH S. HULL, Defendant.

(Supreme Court, Broome County, September, 1921.)

Contract — sale of automobile — rescinded because of mistaken credit on purchase price — no action lies to recover balance alleged to be due.

ACTION to recover purchase price of automobiles.

Walker & Wilber, for plaintiff.

Hinman, Howard & Kattell, for defendant.

TUTHILL, J. This action, as stated in plaintiff's brief, is "brought to recover $1,750.00, the balance due upon the purchase price of an Essex Sedan," together with sundry items which are undisputed, amounting to thirty-nine dollars and nine cents.

On November 6, 1920, the parties entered into a written contract, by the terms of which as expressed the plaintiff sold, and the defendant purchased, an Essex automobile for $2,650. The defendant was allowed on the purchase price the sum of $1,750 for a Paige car, leaving a balance of $900 which the defendant paid, and the Essex car was delivered to and remains in her possession. It also appears that previously and on June sixth of the same year the defendant purchased from the plaintiff a Packard car for which, according to the contract therefor, she was to pay $7,000. The defendant was adjusting the balance due on such contract on November sixth when plaintiff's salesman proposed to the defendant that she purchase an Essex enclosed car for winter driving and advised her that growing out of the exchange of cars under the contract for the Packard car she had a credit for a Paige car for which he would allow

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her $1,750, and which, with $900 in cash, would make the payment in full for the Essex car. The defendant expressed doubt as to her having such a credit, but the plaintiff's manager was insistent that the defendant was entitled to the credit for the Paige car, and the transaction for the Essex car was closed by the defendant giving her check for $900, the balance due under the contract as written. Also the parties at the same time adjusted the balance due from defendant for the Packard car in the sum of $250 for which the defendant gave her check. A few days thereafter the plaintiff's manager discovered his error in that he had given the defendant a credit of $1,750 on the contract with her for the purchase of the Packard car, and a credit for the same amount on the other contract with defendant for the Essex car. He asked the return of the latter car offering to repay defendant what she had paid and expended thereon, or that she pay a balance of $1,750 which the manager contended he had credited on the contract for the Essex car by mistake. Negotiations followed between the parties but no settlement was reached and this action resulted, which, by consent, was tried before the court without a jury.

I am satisfied it was clearly a mistake on the part of plaintiff's manager in giving the credit for $1,750 to the defendant upon the purchase price of the Essex car, as she had already received a like credit on her contract for the Packard car, such allowance having been derived by an exchange of cars resulting in a Paige car being taken in trade for defendant's account under the contract for the Packard car. It is not reasonable that the salesman intended to allow the same credit on both contracts. I am likewise satisfied that there was no intent by defendant to defraud the plaintiff or to take any unfair advantage in purchasing the Essex car. She was frank in stating that she could not understand how she could have

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credit twice for the Paige car and it was only after being assured by the plaintiff's manager that she was so entitled that she made the bargain and took the Essex car. It was an instance of one's being convinced against their will and common sense. The defendant erroneously assumed, on the assurance of plaintiff's manager, that she was entitled to a credit on the contract for the Essex car of $1,750 and that an investment of only $900 in cash would make the payment in full for a car selling for $2,650. The defendant's manager was confused and mistakenly allowed the defendant a double credit of $1,750 on the two separate contracts. Both parties were mistaken.

As before indicated, the plaintiff now asks judgment for a balance under a contract which it established upon the trial contained a mistake in a material particular. It seems illogical to prove a contract containing an erroneous fundamental assumption and then ask a recovery thereon. The situation is entirely different than where there is an account between parties which is settled but a mistake is made in allowing or failing to allow an item. In the present case the contract declared upon is shown to be voidable because of a mistake which destroys it. It is elementary that to constitute a contract there must be a meeting of the minds of the parties. In Benjamin on Sales (7th ed. 1899, § 50, p. 60), it is stated: "From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no real valid agreement notwithstanding the apparent mutual assent."

In *Rowland* v. *N. Y., N. H. & H. R. R. Co.*, 61 Conn. 103, it was held that a mistake as to price is material and a ground for holding that the minds of the parties did not meet, and that their minds not having met, there was no contract.

The plaintiff, when it discovered the mistake, pro-

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ceeded to rescind the contract, which is the "avoiding of a voidable contract." 24 Am. & Eng. Ency. of Law, 609. It demanded a return of the car or the payment of the amount which it claimed was due. It cannot be consistently asserted that a contract can be rescinded and then enforced.

In *Harper, Inc.*, v. *City of Newburgh*, 159 App. Div. 695, 696, 697, the court said: "But in rescission no contract remains, for there was in the eye of the law no meeting of the minds at all. Hence the court may rescind the apparent contract for the mistake of one party only, without a finding of fraud or inequitable conduct in the other." Citing authorities.

Professor Williston, in his late work on Contracts, (1920, vol. 3, § 1557, pp. 2760–2761), says: "But where the error is in the substance of the bargain, not in its expression — that is where the mistake relates to the way the agreed terms will apply to the external world, rescission with restitution of whatever has been parted with, is the only relief possible, though this may be sought in a variety of ways appropriate for different situations. * * *

"Knowledge by one party that the other is under a mistake as to such a matter as would make the transaction voidable if the mistake were mutual, if accompanied by any circumstances deemed inequitable and perhaps generally without more, will have the same effect as mutual mistake in justifying rescission."

The defendant by keeping the Essex car did not ratify the contract therefor excluding the item of credit allowed of $1,750. She at all times after the finding of the mistake denied any liability to pay $1,750 in cash, and contended that she had made the bargain relying on the credit given her for the Paige car, and that she would not have purchased the Essex car paying the entire purchase price in cash. Such falls far short of a ratification of the contract with the credit eliminated.

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It must be held that the plaintiff cannot recover herein under the pleadings and evidence submitted, as such a recovery would be had upon a contract which plaintiff had rescinded. The liability of the defendant to the plaintiff, if any, rests not upon the contract as written by the parties, but in the defendant's retaining the car after the mistake was discovered and demand made for its return. The action would be in assumpsit upon an implied promise on the part of the defendant to pay what in good conscience should be paid for the value of the car, taking into consideration all the facts surrounding the purchase. Williston Cont. *supra*, § 1479, p. 2632; Id. § 1575, p. 2789; *Rowland* v. *N. Y., N. H. & H. R. R. Co., supra.*

It is well understood that a plaintiff can not plead one cause of action and recover on another. No judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence. *Tuthill* v. *Myrus*, 57 App. Div. 37, 40.

The first cause of action set forth in the complaint should be dismissed but not upon the merits. *Conolly* v. *Hyams*, 47 App. Div. 592. Costs are awarded to the defendant, and the clerk should credit on the judgment therefor the sum of thirty-nine dollars and nine cents, with interest from November 8, 1920, which amount is conceded to be due from the defendant to the plaintiff on the second cause of action. Findings may be prepared accordingly.

Judgment for defendant.

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Matter of the Estate of JOHN E. ROBERTS, Deceased.

(Surrogate's Court, New York County, October, 1921.)

Accounting — testamentary trustee — apportionment of extraordinary stock dividends between life tenant and remaindermen — tests to be applied — non-impairment of corpus of trust fund by accumulation of entire surplus from which dividends payable — payment of stock dividend to life tenant.

PROCEEDINGS upon objections to trustees' accounts.

Francis J. McLoughlin, for petitioner.

Joseph S. Johnston, for Mary C. Roberts.

James F. Brady, special guardian.

FOLEY, S. The objections to the trustees' accounts raise the question as to the apportionment of an extraordinary stock dividend between the life tenant and remaindermen. The account shows that on May 2, 1920, the trustees received a stock dividend of sixty-nine shares of the Nicholson File Company, which has been accounted for as principal. All of this stock dividend is claimed as income by the life tenant, the widow of decedent. Under the authorities in this state the tests to be applied are (1) the source of the property paid out in the form of an extraordinary dividend and whether there has been a distribution or division of the earnings, profits or accumulations of the corporation; (2) the language of the will. *Matter of Osborne,* 209 N. Y. 450; *United States Trust Co.* v. *Heye,* 224 id. 242, 255; *Matter of Schaefer,* 178 App. Div. 117; affd., 222 N. Y. 533. The account discloses that the entire amount of the stock dividend was paid from profits accumulated by the company after the death of decedent on September 13, 1907, from which time the widow is entitled to the income of the trust. The stock dividend should, therefore, be

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credited to the life tenant as income. Moreover, the will itself indicates a special solicitude for the widow. Under the trust created in the 6th paragraph, the entire net income is payable to her during her life. By the 1st paragraph of a codicil the testator provided that if the income of the trust should be insufficient to provide comfortably for the needs of his widow, the trustees were directed to use and apply so much of the principal as may be necessary for that purpose. The accounting trustees and remaindermen claim that the recent decisions of *Towne* v. *Eisner,* 245 U. S. 418, and *Eisner* v. *Macomber,* 252 id. 189, overrule the authorities in New York cited above, and apply not only to the computation of income tax, but to the distribution of stock dividends between life beneficiaries and remaindermen. The statement of the court in the latter case, that stock dividends are capital as between the tenant for life and remaindermen is *obiter.* That court expressly limited its decision to the *taxability* of such dividends under the income tax amendment to the Federal Constitution.

As the entire surplus from which the stock dividend was paid was accumulated during the trust period, the *corpus* of the trust fund will not be impaired by paying the stock dividend to the life beneficiary.

Decreed accordingly.

PETER DE PLANTER and Another, Plaintiffs, *v.* SOPHIA DE KRYGER, Individually and as Administratrix, etc., Defendant.

(Supreme Court, Monroe Special Term, October, 1921.)

Executors and administrators — action on contract — submission of claim unnecessary — Decedent Estate Law, §§ 116, 117.

MOTION by plaintiffs for judgment on the pleadings.

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James A. Rolfe, for motion.

F. Allen DeGraw, opposed.

RODENBECK, J. This action is properly brought. The answer presents no issue. There is no general denial and the defenses set up are not valid. The plaintiff had the right to sue the administratrix without having previously filed his claim with her as such. There is no restriction upon the right to commence an action upon a contract against an administrator where the claim has not been submitted to the administrator. Decedent Estate Law, §§ 116, 117. The general rule is that unless there is some statutory requirement to the contrary, the presentation of a claim to the personal representative of a decedent is not a condition precedent to the commencement of an action against the executor or administrator upon such claim. 24 C. J. § 1836, p. 744. The only restriction in this state is where a claim has been presented to the administrator in which case the claimant is required to submit the claim to the jurisdiction of the surrogate unless he sues on it within three months after its rejection or if no part of the debt is then due, within two months after a part thereof becomes due. Code Civ. Pro. § 2681. Prior to 1895 the surrogate had no jurisdiction to try or determine disputed claims against an estate. Heaton Surrogates (3d ed.), ¶ 224, p. 1165. So that where the claim was disputed, even in a case where the claim was presented to the executor or administrator, the claimant was required to sue on the claim in a court having jurisdiction. The Code was amended by chapter 595 of the Laws of 1895 giving the surrogate jurisdiction of disputed claims where the parties filed a written consent to have the claim determined by him upon the judicial settlement, and by the revision of 1914 the authority of the surro-

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gate was broadened so as to give him jurisdiction to try on the judicial settlement all claims, legal or equitable, against a decedent's estate. As the law now stands a claimant may present his claim to the executor or administrator and if it is rejected in writing he may commence an action for the recovery of the claim within three months after such rejection or if no part of the debt is then due, within two months after a part thereof becomes due, and if he does not commence such an action he is barred from doing so and thereby submits the matter to the determination of the surrogate. Code Civ. Pro. §§ 2681, 2510. The submission of claims to an executor or administrator is one of the means provided by law for adjusting them but it is not exclusive and a claimant may still sue without such submission. There was no obligation therefore on the part of the plaintiff to submit his claim to the administratrix and he had the legal right to commence this action without having previously done so. *Martine's Estate,* 11 Abb. N. C. 50; *Baggott* v. *Boulger,* 2 Duer, 160; *Olmstead* v. *Latimer,* 9 App. Div. 163. The statute also gave him the right to join the claim against the administratrix as such with the claim against her as an individual. Code Civ. Pro. § 1815. The plaintiff is entitled to judgment on the pleadings in this action and in the action of Peter Ver Streate et al. against the same defendants, with ten dollars costs in each action.

Judgment for plaintiff.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN VINCENT WARD, Relator, *v.* JOSEPH A. McCANN, Warden of New York County Penitentiary, Respondent.

(Supreme Court, Queens Special Term, October, 1921.)

Criminal law — assault in third degree — sentence upon conviction in city of New York may be fifteen months imprisonment — Parole Commission Act, as amended in 1916 *— discharge on habeas corpus, on ground that under Penal Law, section* 245, *maximum sentence is one year, denied.*

HABEAS CORPUS.

Relator in person for motion.

Michael J. Driscoll, deputy assistant district attorney, opposed.

KAPPER, J. Relator, convicted of the crime of assault in the third degree and sentenced to the New York County Penitentiary under and pursuant to the provisions of the Parole Commission Act (Laws of 1915, chap. 579, as amd. by Laws of 1916, chap. 287), and after fifteen months of imprisonment, now seeks his discharge on habeas corpus upon the ground that the maximum imprisonment for his offense is one year (Penal Law, § 245), and that the parole commission is powerless to hold him beyond that period. His contention finds support in *People ex rel. Kipnis* v. *Warden,* 116 Misc. Rep. 589, but I am constrained to differ with the learned justice in the conclusion there reached. As I read the Parole Commission Act, I think its purpose was to subject all persons convicted of crime in cities of the first class whom the committing court did not regard as requiring a state prison sentence, to the disciplinary, reformatory and correctional powers of the parole commission. In this

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light definite, fixed punishments provided by the various penal statutes when the sentence is to the penitentiary must for that particular instance be deemed modified. I think this legislation has been fully upheld in *People ex rel. Cerozsie* v. *Warden,* 223 N. Y. 307, including the possible increased punishment permitted under it, for in that case, as at bar, the conviction was for assault in the third degree (see Court of Appeals record), and although the discussion there proceeded on the proposition of whether or not the law was *ex post facto,* yet that question could hardly have been decided as it was without an approval of the power to imprison as provided in the Parole Commission Act. The court says (p. 311): "In our opinion the statute in a real as well as in a technical and legal sense was in force at the time when the relator committed his crime and *forewarned him of the punishment which he might expect.* As has been pointed out, it outlined a system of punishment such as has been inflicted upon him and it provided that in case he should be convicted after a commission had been appointed for administering the provisions of said statute he should be punished in accordance with its terms. Thereby it was indicated and he was fully warned before he committed his crime that *in the city of New York* there might at any time be adopted an *altered form of punishment,* which would be applied to him if he was convicted after its adoption." It is said that the Parole Commission Act, if literally followed, establishes different punishments in different parts of the state for the same offenses (*People ex rel. White* v. *Comm'r., etc.,* N. Y. L. J., Aug. 31, 1921), and that the act should, therefore, be limited to the periods of imprisonment elsewhere specifically prescribed. I do not think this view should obtain, as it was competent for the legislature, in my opinion, to prescribe a different or greater punishment for the same offense in cities of the first class than in

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other parts of the state. In *People ex rel. Armstrong* v. *Warden,* 183 N. Y. 223, 226, the court says: "Criminal laws are not necessarily unconstitutional even if they bear unequally upon persons in different parts of the state. The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state and have no existence in rural districts." And in *Matter of Morgan,* 114 App. Div. 45, 54, it was said: "It has been held many times in this State that the Legislature had the power to discriminate between different parts of the State by requiring things to be done in one section of the State which were not required in another, and to make acts crimes in certain portions of the State which were not crimes in the rest." See, also, *People* v. *Havnor,* 149 N. Y. 195. The writ should be dismissed and the relator remanded.

Writ dismissed.

Matter of the Estate of DELLORA C. GATES, Deceased.

(Surrogate's Court, New York County, October, 1921.)

Transfer tax — will of decedent admitted to probate in Texas where estate was taxed — declarations of decedent and her supporting acts and conduct sustain finding that she was a nonresident of the state of New York at her death.

TRANSFER tax proceedings.

Humes, Smith & Tweed, for executors.

Charles M. Travis, for state tax commission.

Robert H. Thorburn in person.

FOLEY, S. In this proceeding the question to be determined is the residence of the decedent. The

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state tax commission contends she was a resident of the state of New York. The estate contends she was a resident of Port Arthur, state of Texas. I find she was a nonresident of this state.

Mrs. Gates died on November 28, 1918. She was the widow of John W. Gates, who died August 9, 1911. Mr. and Mrs. Gates established their residence in Texas about the year 1908. They spent substantial portions of each subsequent year together at Port Arthur, and also maintained an apartment at the Hotel Plaza in New York city. After his death she continued her mode of living in the same manner that she and her husband had lived during his lifetime, dividing her time between her home in Texas, the hotel in New York, and traveling. "A widow, in the absence of adequate proof to the contrary, retains the last domicile of her husband." *Matter of Green,* 99 Misc. Rep. 582; affd., 179 App. Div. 890. In the transfer tax proceedings begun shortly after John W. Gates' death, the order of my learned predecessor, Surrogate Fowler, taxed his estate as that of a resident in Texas. In that proceeding the allegations in the petition of the executors of Mr. Gates, as to his nonresidence, were not denied by the state comptroller. Under former section 2546 of the Code of Civil Procedure (now Surrogates' Court Act, § 76), the uncontroverted petition was due proof of the facts therein stated. In 1918 the state comptroller applied to reopen the original transfer tax proceedings in John W. Gates' estate and to vacate the order fixing tax on the ground that the decedent was a resident, and prayed for the determination of that issue. The supporting papers on that application set forth many of the salient facts contained in the record here. The matter was heard by Surrogate Fowler. In his opinion he states as follows: "A previous state administration instituted a proceeding to assess a tax upon the estate

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of the decedent, investigated the question of his last domicile, and was apparently satisfied that his last domicile was in Texas. It should be a very plain case which would authorize a successor administration to repudiate, so long afterwards, the action of its predecessor in office. Such a case has not been made by the petitioner herein. There is no proof of fraud; there is no evidence submitted on this application, which could not with due diligence have been obtained and submitted in the original proceeding; while the alleged new evidence is so inferential and inconclusive that even if offered on the trial *it would not warrant a finding that the decedent had his last domicile in this state.* The papers, therefore, are insufficient to warrant the court in granting a new trial of the question of decedent's domicile at the date of his death. Application denied." *Matter of Gates,* 103 Misc. Rep. 465, 470. The final order denying the application was made June 17, 1918, and an appeal therefrom was subsequently dismissed. The original order, therefore, has been long acquiesced in by the state of New York as a determination that the husband was a resident of Texas.

But independent of that decision, the declarations of Mrs. Gates and her supporting acts and conduct for many years prior to her death amply justify the finding of non-residence. In her declarations, written and oral, without exception, for a period of ten years, she described herself as a resident of Texas. She took a deep interest in Port Arthur's welfare and upbuilding. Her will was admitted to probate in Texas and her estate has been taxed there as a resident of that state. In my recent decision in *Matter of Frick,* 116 Misc. Rep. 488, I discussed the general tests of domicile and the authorities of this state applicable to the determination of that question. *Dupuy* v. *Wurtz,* 53 N. Y. 556; *Matter of Newcomb,* 192 id. 238;

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Matter of Mesa y Hernandez, 172 App. Div. 467; *United States Trust Co.* v. *Hart,* 150 id. 413. In my opinion the effect of section 243 of the Tax Law creating a disputable presumption of residence was likewise discussed. *Matter of Barbour,* 185 App. Div. 445; affd., without opinion, 226 N. Y. 639. The facts here are not so clear in favor of the estate as those in *Matter of Frick, supra,* and are more similar to those in *Matter of Harkness,* 183 App. Div. 396, or *Matter of Green, supra.* Counsel for the state tax commission contend that the course of decedent's conduct indicates a deliberate design, under advice of counsel, to escape any legal inference of a New York residence. While such a course of conduct is indicated in the evidence, it does not follow that this excess of zeal destroyed a domicile legally established and actually continued with the requisite elements of intent and supporting facts.

I find that the proofs and exhibits in the voluminous record here repel and overcome the statutory presumption.

The application of Robert H. Thorburn to intervene is denied. He has no status in this proceeding. Submit order remitting the matter to the appraiser to proceed accordingly.

Ordered accordingly.

Matter of the Estate of EDWARD MOELLER, Deceased.

(Surrogate's Court, New York County, October, 1921.)

Wills — life estate to widow not stated to be in lieu of dower — election not required — Real Prop. Law, § 200 *— when only entitled to income.*

PROCEEDING for construction of will.

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Edward A. Alexander, for petitioner.

FOLEY, S. This is an application for the construction of the will of the above named testator in so far as it relates to the right of the widow of the deceased to obtain a dower interest in his estate. Paragraph second of the will reads as follows:

"*Second.* I give, bequeath and devise unto my beloved wife Lina Moeller absolutely during her natural life, the full, free and unrestrained use of my property, real, personal and mixed, wheresoever situated. I also give unto my said wife full power of sale of any of my said property described aforesaid during her natural life, and direct that any moneys so received by her shall be reinvested by her or by her and my executors hereinafter named, should it become legally necessary to first obtain said signature therefore, in such securities as the laws of New York permit an executor and trustee of an estate to invest. And I empower my said wife to reinvest such funds so received in any other securities which she may deem judicious, subject, however, to the consent of my nephew and executor hereinafter named, Mr. Henry M. Moeller."

Upon the death of the widow, the remainder is given to various relatives.

The interest of the widow under the provisions of this will is a legal life estate in all of the testator's property. There was no express direction that the gift to the widow was in lieu of dower. No trust was created. The claim of dower by the widow is not therefore inconsistent with the testamentary provisions for her benefit. *Lewis* v. *Smith,* 9 N. Y. 502; *Konvalinka* v. *Schlegel,* 104 id. 125, 129; *Purdy* v. *Purdy,* 18 App. Div. 310; *Horstmann* v. *Flege,* 172 N. Y. 381; *Matter of Springsteen,* 86 Misc. Rep. 389; *Matter of Bloss,* 100 id. 643. She is not required to

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elect (Real Property Law, § 200), and is, therefore, entitled to her dower in the real property.

The contention of the petitioner that the widow is entitled to the profits on the sale of the premises 68 West Ninety-sixth street is erroneous. The widow is entitled to income only and is without power to invade the principal. Therefore the profit of $6,394.90 realized from this sale must be deemed to be capital and not income. This sum should be reinvested as directed by the terms of the will.

Decreed accordingly.

Matter of the Estate of Isaac Walker, Deceased.

(Surrogate's Court, New York County, October, 1921.)

Surrogate's Court — real property of non-resident within jurisdiction — power to fix bonds of testamentary trustees — Decedent Estate Law, § 44, as amended in 1921 — Surrogate's Court Act, § 171.

Application to fix bond of testamentary trustee.

Leigh K. Lydecker, for petitioner.

Foley, S. The petition is entertained. This court has jurisdiction to fix the bond of resident testamentary trustees appointed by a will admitted to probate in England and recorded in this office as provided in section 44, Decedent Estate Law (as amended by chapter 293, Laws of 1921), where the trust consists of realty within this county. The authorities holding that the Surrogate's Court has not jurisdiction of trusts created by the will of a non-resident have all recognized the jurisdiction of this court where there was real property in the *corpus* of the trust located in this state. *People ex rel. Safford* v. *Surro-*

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gate's Court, 229 N. Y. 495; *Matter of Hoyt,* 103 Misc. Rep. 614; *Matter of Yuill,* 109 id. 465; Surrogate's Court Act, § 171. As the petition alleges there is some uncertainty whether Frank W. Arnold, named as a co-trustee, will qualify, a citation should issue to him, or his renunciation filed. Bond fixed in the penal sum of $120,000.

Ordered accordingly.

Matter of the Estate of ANDREW CARNEGIE, Deceased.

(Surrogate's Court, New York County, November, 1921.)

Transfer tax — no deduction for federal estate tax — tenancy by entirety taxable at one-half value — pensions created by unrevoked deed of trust not taxable — Decedent Estate Law, § 17.

APPEALS from order fixing transfer tax.

Root, Clark, Buckner & Howland, for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state tax commission.

FOLEY, S. Cross-appeals have been taken by the estate and the state tax commission from the order fixing transfer tax. The executor appeals on the ground that the federal estate tax has not been allowed by the appraiser as a deduction. The decision of the Court of Appeals in *Matter of Sherman,* 222 N. Y. 540, sustains the action of the appraiser and the appeal is denied.

The state tax commission appeals upon the following grounds, first, that the transfers of certain parcels of real property held by the decedent and his wife as tenants by the entirety should be taxed; second, that the failure to impose a tax on the value of the life

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interests in the pension funds established by Mr. Carnegie was error; and third, that the method adopted by the appraiser in his computation of the amounts passing to certain charitable corporations and to the widow was erroneous.

The appeal of the state upon the first ground is sustained, and the order will be modified so as to provide for a tax upon the value of one-half of the real estate involved.

Andrew Carnegie died August 11, 1919. In 1898 and 1899 various parcels of real estate in New York city were conveyed to him and his wife, thereby creating in them a tenancy by the entirety. *Bertels* v. *Nunan,* 92 N. Y. 152; *Hiles* v. *Fisher,* 144 id. 306. Until the amendment of section 220, subdivision 7, of the Tax Law, made by chapter 323 of the Laws of 1916, the transfer of this form of property was free from tax. By that statute the tax was specifically imposed upon the transfer to the survivor in the following language: "the right of the surviving tenant by the entirety * * * to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety * * *."

The executor contends that the surviving widow takes under the original conveyance by which the tenancy was created and that no transfer took place at the death of the decedent. The authorities in this state have greatly modified the attributes of the common law tenancy by the entirety. By reason of the enactment of the Married Woman's Property Acts by our legislature, the husband and wife are now tenants in common with equal rights in the rents and profits and with the right of survivorship. *Matter of Goodrich* v. *Village of Otego,* 216 N. Y. 112, 117; *Hiles* v.

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Fisher, supra; Grosser v. *City of Rochester,* 148 N. Y. 235. The respective rights of the husband and wife in this form of title and the taxability of the transfer in the estate of the spouse first dying are clearly set forth by Mr. Justice Putnam in *Matter of Moebus,* 178 App. Div. 709. The facts there were exactly the same as those in Mr. Carnegie's estate, viz., creation of the tenancy before the passage of the act of 1916 and death after its enactment. The contention of the executor that the decisions of the first department differ from those of the second department in *Matter of Moebus* is unfounded. In *Matter of Horler,* 180 App. Div. 608, the court held that a similar transfer in 1915 was free from tax, but the death there occurred previous to the amendment of 1916, which enlarged the scope of section 220, subdivision 7, and specifically included real estate and other tangible property. In his opinion Mr. Justice Shearn pointed out that where the death occurred after that amendment the estate would be taxable, for he states: "The situation presented in this case is one that cannot arise in the future, for the Legislature of 1916 defined such a succession of interest as occurred on the death of Mary Horler to be a taxable transfer. Counsel for the state comptroller cites *Matter of Moebus,* 178 App. Div. 709; but while that case dealt with a tenancy by the entirety and held the succession taxable, the decision was based, and necessarily so, on the 1916 amendment (Chap. 323), which was in effect prior to the death of the cotenant."

Whether the transfer to the survivor be regarded as the *jus accrescendi,* or the termination of the right of the deceased cotenant to one-half the rents and profits, or the elimination of his interest in the entire fund, a succession of interest does take place at the death of the first cotenant and the legislature has, within its powers of taxation, expressly declared that

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this transfer shall be assessed. *Matter of Dolbeer,* 226 N. Y. 623; *Matter of Orvis,* 223 id. 1, 7; *Matter of White,* 208 id. 64, 67.

Second. In the year 1901 Mr. Carnegie, by letter, transferred to the Home Trust Company as trustee securities of the value of $1,250,000, and directed that out of the income pensions be paid to certain persons. Additional amounts were subsequently added to this fund, and in 1911 Mr. Carnegie executed a trust deed covering the *corpus* of the trust, which amounted at that time to $3,250,000. At the time of his death, by further contributions, this fund amounted to $4,250,000. The provisions of the deed were that the income should be used to pay the pensions for the lives of the pensioners, that any surplus income be credited to the account of Mr. Carnegie, that as the pensioners died, the trustee should from time to time transfer the trust securities to the grantor or his estate. The deed also reserved to the grantor the right of revocation, and provided that he might add to or cancel the pensions. At the time of his death over 400 pensioners of this fund were living, classified as follows:

1. Veterans of the Military Telegraph Corps and their widows. These veterans had served in the Civil War but not as part of the military forces of the United States, and were excluded from the benefits of the government pension system. Mr. Carnegie had served with them.

2. Retired employees of the Pennsylvania railroad (Pittsburgh division).

3. Retired teachers ineligible for pensions under Carnegie foundation.

4. Old friends, servants and other deserving persons.

The average pension was comparatively small in amount.

No dispute arises as to the taxation of the surplus income due Mr. Carnegie or the estate, nor to the

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remainder of the *corpus* of the trust. The only question in dispute is the taxability of the life interest of the pensioners. While the deed of trust reserved to the grantor the power of revocation, there is abundant evidence in the record there was no intention on his part to exercise that right. In any event it was not exercised by him in his lifetime. The surrounding circumstances show that the grant of these pensions constituted an absolute gift during his life to the beneficiaries. Mr. Carnegie's death in no way affected the rights of the beneficiaries to the pensions. No tax, therefore, can be imposed upon the passing of the particular fund in dispute. The reservation of the power of revocation does not affect the character of the gift. *Matter of Masury,* 28 App. Div. 580; affd., 159 N. Y. 532; *Matter of Bowers,* 195 App. Div. 548; affd., 231 N. Y. 613; *Matter of Cochrane,* 117 Misc. Rep. 18; *Matter of Wing,* opinion of Cohalan, S., N. Y. L. J. Nov. 9, 1921. The appeal of the state tax commission on this ground is denied.

Third. The remaining ground of appeal of the state tax commission relating to the appraiser's method of computation and valuation of the transfers to the Carnegie Corporation of New York and to the widow must be overruled. By reason of the fact that Mr. Carnegie left surviving a wife and daughter the terms of the will violated the provisions of section 17, Decedent Estate Law. The total net estate was approximately $23,200,000. The legacy to the Carnegie Corporation, if the will was valid, amounted to approximately $16,000,000. That section of the Decedent Estate Law provides as follows: " No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such

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devise or bequest shall be valid to the extent of one-half, and no more." The appraiser properly included the value of the foreign real estate in the gross value of the estate, and the appraiser then deducted from this total the amount of the debts. *Decker* v. *Vreeland,* 220 N. Y. 326, 336; *Matter of Moderno,* 5 Dem. 288. With certain undisputed adjustments he fixed the value of the transfer to the Carnegie Corporation at one-half the net estate, $10,673,418.67. Article tenth of the will provides that in case any of the bequests should prove ineffectual or contrary to law, the property invalidly bequeathed should go to the widow. The Carnegie Corporation, by operation of law and under the terms of the will, became a general legatee and Mrs. Carnegie the residuary legatee. The state's contention, therefore, that the administration expenses, amounting to $750,000, must be deducted in addition to the debts in arriving at her share, must be overruled. *Matter of Brooklyn Trust Co.,* 179 App. Div. 262; *Matter of Allen,* 111 Misc. Rep. 93, 131; *Decker* v. *Vreeland,* 220 N. Y. 326, 336; *Matter of Colburn,* 92 Misc. Rep. 700. This section provides only for the deduction of debts. The incidental question raised under this ground of appeal, that the income earned on the amount of the legacy to the Carnegie Corporation during the first year of administration of this estate should be included, must also be determined in favor of the estate. Although this income ultimately increased the share of Mrs. Carnegie, the value of the transfers must be determined as of the date of death (Tax Law, §§ 222, 243; *Matter of Penfold,* 216 N. Y. 163), and any subsequent accruals must be disregarded.

The report will be remitted to a transfer tax appraiser for the purpose of fixing the tax on the real estate owned by decedent and his wife as tenants by the entirety. Submit order accordingly on notice.

Ordered accordingly.

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Matter of the Estate of Frank Trumbull, Deceased.

(Surrogate's Court, New York County, November, 1921.)

Transfer tax — when contingent remainders taxable — Tax Law, § 241 — refund under section 230 — taxation against one per cent class.

Appeal by executor from order of transfer tax appraiser.

Rearick, Dorr & Travis (James H. Purdy, Jr., of counsel), for executor.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state tax commission.

Foley, S. The executor appeals from the order fixing tax on two grounds: *first,* that the remainders are not taxable until the exercise of the power of appointment; *second,* that the order improperly provides that the remainder interest should be taxed against the five per cent class instead of the one per cent class.

On the first ground the contention of the executor must be overruled. The decedent died on the 12th day of July, 1920. By his last will he gave to his trustees certain funds with income for life to his son, Roscoe A. Trumbull, with power of appointment by will to the latter over the principal. In default of the exercise of the power the remainders are to pass to the issue of the son living at the time of his death. The remainder is, therefore, contingent. *Matter of Buechner,* 226 N. Y. 440. Section 241 of the Tax Law (added by chapter 800 of the Laws of 1911) makes clear the legislative intent of requiring prompt payment of taxes at the highest rate at which they may be taxed and the immediate imposition of taxes on remainders subject to conditions and contingencies. *Matter of Zborowski,*

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213 N. Y. 109; *Matter of Parker,* 226 id. 260. In the latter case Judge Cardozo clearly sets forth this policy as follows: "The purpose is to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession there will be a refund of any excess (Tax Law, § 230). The life tenant does not suffer, or, at all events, not seriously, for interest is paid by the comptroller upon the difference between the tax at the highest rate and the tax that would be due if the contingencies or conditions had happened at the date of the appraisal (Tax Law, § 241). If the trustees prefer they may deposit securities of approved value and receive the accruing income (§ 241). To guard against shrinkage of values, the statute bids them pay the balance, if the deposit turns out to be too small. Everywhere the scheme disclosed is absolute safety for the state, with a minimum of hardship for the life tenant. * * * Collection is imperiled when the state must keep track of the estate through all the changes and chances of an indefinite future. The path of safety is followed when collection is made at once."

By the same amendment in 1911 this legislative purpose was emphasized by providing in section 230 of the Tax Law for the entry of a temporary order. These amendments, and the recent decisions of the Court of Appeals, *supra,* have entirely overcome the force and reason expressed in the opinion of *Matter of Howe,* 86 App. Div. 286; affd., 176 N. Y. 570, which held that taxation should be suspended where the power given was absolute. At the time of the latter decision, subdivision 6 of section 220 of the Tax Law provided for the taxation in the estate of the donee of the property affected by the exercise (or non-exercise) of the power. Apparently the court regarded this language as assur-

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ing the taxation of the property in the grantee's estate only. Subsequent to this decision in 1904, the Court of Appeals held that the statutory provisions for the tax in the donee's estate on the non-exercise of the power were unconstitutional. *Matter of Lansing,* 182 N. Y. 238. It will be noted that the provisions of section 241 were not effective until July 28, 1911. In the present estate, the power of appointment given in this will is not absolute under our Real Property Law (§§ 149 to 153), because the power was accompanied by a trust and the donee is the beneficiary of the trust and not the owner of *a legal estate for life or for years. Matter of Howe, supra,* relied on by the executor, would in no event be applicable to this estate for there the power was absolute. An examination of the case on appeal shows that there was a legal life estate in the donees of the power by reason of the merger of title in the trustees and equitable life tenants. *Greene* v. *Greene,* 125 N. Y. 506. The power given by the will here is a general beneficial power but with an equitable life estate in the donee, and under the statutes noted and authorities in this state is not absolute. *Cutting* v. *Cutting,* 86 N. Y. 522; *Rose* v. *Hatch,* 125 id. 427; *Hume* v. *Randall,* 141 id. 499. It is entirely possible that the power of appointment, conferred by this testament, will not be exercised, and the taxation will, therefore, be ultimately assessed in the donor's estate. A recent example is *Matter of Duff,* 114 Misc. Rep. 309; affd., 196 App. Div. 969. In that case the power was invalidly exercised by the donee and the transfer took place in the donor's estate. The entire fund was there taxed. In many cases also the appointees elect to take under the grantor's will and the tax is paid in the grantor's estate. *Matter of Lansing, supra; Matter of Ripley,* 192 N. Y. 536; *Matter of Slosson,* 216 id. 79; *Matter of Chauncey,* 102 Misc. Rep. 378. Section 222 of the Tax

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Law does not apply to the taxation of these remainders, because their fair market value can be and has been ascertained in this proceeding. The policy of presently taxing the remainders results in real advantage to the beneficiaries of the estate for the reasons pointed out in *Matter of Parker, supra.* The deposit is of added benefit to the estate because the tax is lower if presently fixed should the remainders pass in this estate. If the power is finally exercised, the deposit will be returned to the legal representatives of the father's estate. If the taxation should now be suspended, and the life tenant should not appoint under the power, section 230 provides that the tax shall be fixed at the time the remainders vest in possession and enjoyment in the donor's estate on the full undiminished value of the entire trust fund. In this estate the tax on the value of the remainder presently payable under section 241 would be at the rates within the one per cent class on $126,149.47. If on the other hand the plan contended for by the executor was adopted the tax would be upon the full and undiminished value of the trust fund without deduction of the value of the life estate and would be based upon $434,292.47.

The opinion of the Appellate Division in *Matter of Canda,* N. Y. L. J., July 9, 1921, did not determine the question here involved, as the Appellate Division did not consider that part of the decision below.

Second. The appeal upon this ground is sustained. No provision was made in the will of decedent for the disposition of the remainders in case his son should die without issue and without having exercised the power of appointment. In this contingency the estate would vest as a reversion in the son as the sole next of kin of decedent. *Duff* v. *Rodenkirchen,* 110 Misc. Rep. 575. Under the donor's will the remainders therefore must ultimately pass to a person in the one

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per cent class. *Matter of Zborowski, supra.* The tax should, therefore, be fixed at that rate and the order should be modified accordingly.

Submit order on notice in accordance with this decision.

Ordered accordingly.

J. W. BRENNAN CONSTRUCTION COMPANY, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 15747.

(Court of Claims, December, 1921.)

Contracts — for improvement of state and county highways — delay and interference with claimant's performance of work — burden of proof on claimant to rebut presumption that sand was properly rejected because inferior to accepted sample — award for damages arising solely because of state's default in placing a culvert.

CLAIM for damages for breach of contract.

W. Smith O'Brien, for claimant.

Henry P. Nevins, deputy attorney-general (Charles A. Clark, deputy attorney-general, on the brief), for the State of New York.

CUNNINGHAM, J. The claimant entered into a contract with the state of New York for the improvement of a state and county highway in Chemung county, known as the "Erin-Van Etten-Spencer, part one, County Highway No. 1311," six and eighty-seven one-hundredths miles long, and extending east and west. The contract was dated August 30, 1915, and was executed by the claimant September 1, 1915, and

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by the state September 17, 1915. It required the contractor to begin work within ten days and to complete the work on or before the two hundredth working day, which would be on or about November 15, 1916.

About three and nine-tenths miles from the west end of the road a ravine crossed the highway. The plans, part of the contract, provided for a concrete culvert six feet by eight feet at this point, "to be built by the town," over which culvert when built the claimant was required to deposit earth fill for a distance of about eighty feet and to a depth of twenty feet. On August 21, 1915, the town of Erin notified the state that the various bridges within its limits and in the route of the highway would be built, except the concrete culvert mentioned, the town contending it was unnecessary, and that an iron boiler three feet in diameter had sufficed previously under all flood conditions.

On September 17, 1915, the commissioner of highways, by letter, advised claimant that the right of way "has been acquired, the contract has been executed by the Commissioner and work upon the same can be started at once by you." On October 21, 1915, the state's engineer wrote to the claimant, "unless we find that you are prepared to start within the next week, I shall have to take up this matter with the department at Albany, * * * two-hundred working days are allowed you for the completion of this contract." The claimant then was ignorant of the position the town of Erin had taken. The claimant began performance on October 20, 1915, and during that month and November following delivered on the site of the contract the necessary plant and equipment. Much of the fill necessary was extensive and heavy and required the use of a steam shovel. This implement, weighing eighteen tons, began excavation at the east end of the road and worked westerly toward the ravine. There was ample time for the construction

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of the culvert before the excavation so begun could progress to the ravine. The contract provided that the material to be deposited over the culvert must be taken from the highway on each side of it.

The orderly and proper method to progress the work required that the claimant obtain material to the east of the culvert to make a sufficient fill over it for the steam shovel to cross, and then to proceed with the work on the west side of the ravine. The claimant planned and prosecuted the work to that end, but when the shovel had progressed to the point east of the ravine from which material should be taken to make the fill over it, the culvert had not yet been built. This was on December 21, 1915, and only four days' excavation work for the shovel remained to be done between the point where it had arrived and the site of the culvert. Between September 17, 1915, and December 21, 1915, the claimant, at various times, had called the attention of the state's engineers to the imperative necessity that the culvert be built promptly and that failure to do so would impede the claimant. The latter was assured each time that it soon would be built. On December 21, 1915, the claimant suspended all operations and did not resume work until the following spring. Its reasons for doing so were two — unfavorable weather conditions because of which it preferred to suspend work, and the absence of the culvert which prevented further progress. Relying on the state's assurances, the claimant retained the shovel until July 1, 1916, at the east of the culvert, so that it might continue the work from that point. In June, 1916, impelled by the necessity for the completion of the culvert and the harassment resulting from its absence, the claimant itself attempted to build the culvert, being willing to assume the risk of obtaining compensation for it, but the state halted that work and prevented it being done. On July 1, 1916, the culvert not having been constructed, the

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claimant transferred the shovel to the west side of the ravine by means of a detour and considerable effort and expense. This could not have been done by any reasonable process in the winter months because of the physical conditions prevailing. The steam shovel excavation to the west of the ravine was continued during the season of 1916 and completed in the spring of 1917, at which time the culvert had not yet been built, and the claimant being unable yet to make the fill at that point, sent the shovel to work on another contract.

The culvert was completed in July, 1917. The claimant thereafter was required to return the shovel to that point and complete the fill there, in August, 1917. The road was completed and accepted August 27, 1918.

Damages are sought in this proceeding,

(1) Because of the alleged delay and interference with claimant's performance of the contract because of the failure to provide it with the site of its work, through the omission to build the culvert at the proper time; and also,

(2) Because of the following facts: Written information furnished the claimant at the time it bid provided:

"REPORTS OF MATERIALS.

"*Sand*

"Sand, * * * taken from the property of Dwight Wolever, * * *. Reported plentiful. This sand is accepted for use in any class of concrete * * *.

"*Gravel*

"Gravel, * * * from the property of Dr. Canfield, * * * is accepted for use in second and third class concrete * * *."

The plans also provided: "Sand and gravel * * * shall be approved local materials from sources of supply located in the vicinity adjacent to the highway to be improved."

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The contract provided: "Information will be furnished when available regarding location of accepted materials but the use of any materials will be permitted only so long as its quality remains equal to that of the accepted sample. In all cases the contractor will be required to satisfy himself as to the available supplies of materials and the relative location of the same."

The contract further provided: "The contractor further agrees, that he is fully informed regarding all of the conditions affecting the work to be done and labor and materials to be furnished for the completion of this contract, and that his information was secured by personal investigation and research and not from the estimates of the state commission of highways; and that he will make no claim against the state by reason of estimates, tests or representations of any officer or agent of the state."

Thereafter, the state rejected sand from Wolever property and claimant imported sand at an additional expense of $522.52. The amount of gravel found on the Canfield property was negligible and the claimant was obliged to procure it elsewhere at a cost of $649.56.

We will discuss the second phase of the claim first. There is a paucity of evidence of the circumstances under which the sand was rejected, There was no testimony that it was equal to the sample accepted. One of the claimant's officers testified that the state "again accepted the sand" after the work was done. The meaning of this is not clear. It may refer merely to sand from the same pit. Certainly it is not proof that identically the same sand, or sand of equal quality to that rejected, was accepted later for the same purposes. The right of the state to refuse to permit the use of sand inferior to the accepted sample is clear under the contract provisions quoted. It is elementary that the regularity and validity of official acts

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are presumed, and the burden was upon the claimant to rebut the presumption that the sand was properly rejected because it was inferior, by appropriate evidence. It has not done so. Nor is there any liability for failure of the supply of sand or gravel at the locations indicated. The last contractual provision quoted obviates it. There is no evidence of lack of opportunity to the claimant to investigate fully the sources of supply, or of inequality or inequity. This identical provision was construed by the Court of Appeals in *Matter of Semper* v. *Duffey*, 227 N. Y. 151.

Judge Pound in his opinion rejected the claim of mutual mistake and gave full effect to the contractual phraseology, saying: "The statement was suggestive merely, directing him for inquiries to what the state considered the nearest available source of supply. The bidder had the same opportunity to discover the facts that the state had and he in his proposal agreed to execute a contract to the effect that he had availed himself of his opportunity and was content to make the proposal and to execute the contract upon the understanding that he was relying on his own personal investigation.

"We held in *Faber* v. *City of New York* (222 N. Y. 255, 260) that where the contractor had no reasonable opportunity to discover the truth as to the position of bed rock and the evidence was sufficient to show that the contract was made by both parties on the understanding that the bed rock was as indicated in the plan prepared by the city, the contractor might recover for extra work, but here the parties had entire equality of opportunity. * * *. The proposal is made at the bidder's risk in these regards, certainly where no element of deception or inequality or inequity is presented. * * * The result may seem harsh but the state properly protects

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itself by the strictness of its contract and the relator must be bound by the terms thereof."

In defense to its alleged liability for damages due to delay in placing the culvert, the state contends that the building of this structure was imposed by law upon the town and the state was without power to built it, that the claimant made the contract "with its eyes open," with its knowledge of the law presumed, that for the town's omission it is not liable and that absence of the culvert, in fact, did not impede or damage the claimant.

The general obligation of a party to provide his construction contractor with the site for the work and to refrain from impeding its performance is not, and cannot be, denied. *Cross* v. *Beard*, 26 N. Y. 85; *Mansfield* v. *N. Y. C. & H. R. R. R.*, 102 id. 205. Quoting the latter opinion: "It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other prior thereto, that the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned, against the defaulting party."

An important portion of the site was the culvert, and unless the alleged defenses interposed are meritorious, the failure to provide it was a breach of the contract. The Highway Law, section 2, subdivision 5, provides: "A highway * * * shall be deemed to include necessary *culverts*, sluices, drains, ditches, waterways, embankments, retaining walls, and all *bridges* having a span of *five feet or less*." In section 120 it is provided that state highways "shall be constructed or improved at the sole expense of the state."

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It will be noted that, by the statute, a "highway" expressly includes culverts and expressly excludes bridges of five feet or more span. The former are to be built by the state, the latter are not, and by other provisions of the Highway Law must be built by the town. In its transactions with the claimant and the town, and on the trial, the state contended that this structure was a bridge which the town was obliged to build. We do not agree. The plans designated the structure a "culvert." The dictionaries and technical authorities, as well as the decisions, recognize the distinction between culverts and bridges. Century Dictionary; *Proprietors of Bridges* v. *Hoboken Land Co.*, 13 N. J. Eq. (2 Beas.) 503, 511; *Board of Commissioners, etc.*, v. *Bailey*, 122 Ind. 46; *Oursler* v. *Balto. & Ohio R. R. Co.*, 60 Md. 358; *Cleveland* v. *Town of Washington*, 79 Vt. 498. The Century Dictionary defines a bridge as "Any structure which spans a body of water, or a valley, road, or the like, and affords passage or conveyance." It defines a culvert as "an arched or flat-covered drain of brickwork or masonry carried under a road, railroad, canal, etc., for the passage of water." This court in *Kerwin Construction Co.* v. *State of New York*, No. 13840, in which no opinion was written, recognized the distinction, and construed the term "highway" to include four culverts whose spans exceeded five feet. It is true that certain structures, particularly of masonry or concrete, having features of both, may be described as either bridges or culverts, but there is no difficulty in classifying this one as a true culvert. It had the structural essentials of a culvert. It did not span the stream; it was carried under the road, the fill over it being eighty feet long and twenty feet deep. The obligation to build it was on the state, not on the town. The state urges that the clause in the plans, "to be built by the town," determined the rights and obligations of the parties irre-

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spective of the statute. This phrase was not effective to relieve the state from its duty to provide the site for the work. If it were so intended appropriate language could have been used. Our view is that neither this phrase, nor the legal obligation on the town to build the structure, if that obligation be conceded for the purpose of argument, relieved the state from its duty. The claimant had no relations with the town. The state, on the contrary, had ample opportunity to protect itself. It could have refrained from executing the contract until it had received the proper guaranties. The risk of the town's omission was on it, and not on the claimant. In addition, the state executed the contract, not only without assurances, but with full knowledge of the town's refusal, of which claimant was ignorant, and then compelled the claimant to begin the work. In *Lane Brothers Co.* v. *State of New York*, 11 State Dept. Rep. 117, the contract provided: "It is expected that the masonry abutments and superstructure necessary to carry the railroads over the canal prism together with so much of the excavation and backfilling as may be necessary therefor will be carried out by the railroad companies." The companies refused to do the work, the state failed to do it, the contractor thereby was denied the site for his operations and impeded, and Judge Haight, official referee, said: "It consequently follows that the State within a reasonable time was obligated to provide the contractor with the sites of the railroad companies, in order that it might perform its contract in excavating the prism of the canal thereunder. This the State has failed to do and, therefore, it became liable to the claimant for a breach of contract for the damage it has sustained by reason of such failure. * * *

"Under the provisions of the contract, as I have already shown, the State expected that the railroad companies would construct the bridges over the canal,

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but this the companies failed to do. It, therefore, becomes the duty of the State to either construct the bridges or let contracts therefor."

A somewhat similar proposition was involved in *Schunnemunk Construction Co.* v. *State of New York*, 116 Misc. Rep. 770. In that case the county failed to acquire the necessary rights of way before construction began, as required by statute. The contractor thus was denied the site for his work and his progress delayed. We held the state liable, saying: "The issue is whether the state has violated the contract, by interfering with and interrupting the claimant in its performance of its obligation. Such interference between individuals or corporations confers a right of action. (*Mansfield* v. *N. Y. Cent., etc., R. Co.*, 102 N. Y. 205; *Del Genovese* v. *Third Ave. R. R. Co.*, 13 App. Div. 412; affd., 162 N. Y. 614.) * * *"

"We are not unmindful of the statutory provisions above referred to, but the claimant had no power or function in that connection. It was the duty of the county to procure the right of way, and of the state to satisfy itself in that respect before directing the claimant to proceed. This was a matter between the state and the county, and the state could use its own means to assure, protect and inform itself, before ordering claimant to begin work. No question of ignorance of law as an excuse is involved here."

The only remaining question is one of fact. The absence of the culvert very seriously delayed and damaged the claimant. It was not reasonably possible, or practicable, for the claimant to move its shovel around the ravine in the winter of 1915–1916. That inquiry is of little importance, anyway. The claimant was entirely justified in keeping the shovel on the east side of the ravine, in position to resume work when the culvert was completed, relying as it did, and had a right to, upon the repeated assurances of the state

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that it soon would be in place. Claimant was not obliged to assume their assurances to be worthless and to expend the considerable sum and effort required to make the detour. We find, however, part of the damages for delay, for which recovery is sought, was not the result of the state's breach of the contract, but was the fault of the claimant. An award is made in the sum of $23,893.25, being the damages suffered by the claimant solely because of the state's default.

ACKERSON, P. J., concurs.

Ordered accordingly.

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BANKS AND BANKING.

1. *Money had and received — Mistake — Bills of exchange — Burden of proof.— Prima facie,* money paid by mistake to one entitled thereto may be recovered back even though the mistake was due to the negligence of the one making the payment. If, however, in such case, the defendant by reason of the mistake has changed its position to its detriment so that the parties cannot be placed in *statu quo,* there can be no recovery, and the burden of proof of showing that its position has been so changed rests upon the defendant. The plaintiff, having received from defendant certain drafts for collection in Rio de Janeiro with instructions to pay therefrom a certain amount to a certain person in that city, the Rio bank as correspondent of plaintiff transmitted to it the full amount of the drafts and sent a charge slip to represent the money paid to the designated person in Rio de Janeiro. Through an error in plaintiff's bookkeeping department the charge slip was either overlooked or not connected with the transaction, with result that plaintiff transmitted the full amount of the drafts without making any reference to the payment to the person in Rio de Janeiro, who sometime thereafter called upon defendant in the city of New York, and upon being asked whether he had been paid said money replied that he had not, whereupon defendant paid it to him. Later plaintiff discovered its mistake and demanded repayment from defendant. When upon the trial of an action for money had and received defendant offered to prove that the person in Rio de Janeiro had gone away and that it could not collect from him, the court at the instance of plaintiff's counsel excluded that "entire line" of questioning to which the defendant duly excepted. *Held,* that the exclusion of the testimony was error for which a judgment entered in favor of plaintiff on the verdict will be reversed and a new trial ordered. Bank of New York v. B. A. Simmons & Co., 103.

2. *Stopping payment of check — Holder in due course may recover.*— The holder of a check acquired in due course and for value is entitled to recover against the maker, even though the instrument was diverted through the fraudulent acts of the payee. The day after one of the defendants had made his check for $250 to the order of the other defendant in payment of certain shares of stock to be delivered, the maker told the payee that he did not want to buy the stock. A few days later the payee presented the check to plaintiff, receiving $205 in cash, the balance being deposited to his account, bringing the same up to $80.23, and on the same day he withdrew $80. In the meantime, the maker had stopped payment of the check and on its presentment in the due course of business at the bank upon which it was drawn, payment was refused and the check went to protest. In an action on the check it appeared that plaintiff had no notice or knowledge of any infirmities in respect to the check at the time the payment was made thereon. *Held,* that plaintiff was entitled to recover the full amount of the check, with interest, less any amount paid thereon by the payee. Geneva National Bank v. Fox, 129.

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BANKS AND BANKING — Continued.
stands in the name of "Rosie Haberman in Trust for Frederick Haberman," an incompetent, the court, on motion of his committee for an order directing the bank to pay over money to the credit of said account and claimed to belong to the incompetent, is without power to summarily determine that the money deposit was the property of the incompetent before deposit made by Rosie Haberman, his stepmother, that her act in depositing in trust was the act of a trustee or that the deposit "in trust for" entitles the incompetent to the fund. Matter of Frederick Haberman, 446.

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BILL OF SALE.
See **Lien Law.**

BILLS AND NOTES.
Bank receiving check for deposit is not merely the agent of the indorser but a trustee of an express trust and can bring action in its own name — Negotiable Instruments Law — Civil Practice Act, § 210.— A check indorsed and delivered by the payee was received by plaintiff, a bank, for deposit, the deposit slip containing a clause "checks credited subject to payment," and, on presentment of the check for collection, payment was refused. In an action on the check against the maker, *held,* that the mere crediting of the check by plaintiff to the depositor's account on its books did not constitute it a "holder in due course" as that term is defined in the Negotiable

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BILLS AND NOTES — Continued.
Instruments Law so as to render its title superior to defenses which the drawer might have against the payee, it appearing that the depositor's account continued to be sufficient to pay the check in the event of its dishonor. The defendant made no attempt to prove any defenses, as he might have done, but the complaint was dismissed on the ground that plaintiff was merely the custodian of the check solely for the purposes of collection and was not entitled to bring the action in its own name. *Held,* that since the Negotiable Instruments Law expressly gives the holder of a negotiable instrument under an indorsement which constitutes him the agent of the indorser, the right to bring any action on the instrument that the indorser can bring, the plaintiff was not merely the agent of the indorser but was the trustee of an express trust under section 210 of the Civil Practice Act (Code Civ. Pro. § 449) and entitled to bring the action in its own name, and the judgment entered on the dismissal of the complaint will be reversed and a new trial ordered. Mechanics & Metals National Bank v. Termini, 309.

BOUNDARIES.
Ejectment — Disputes as to location of boundary line — Conveyances according to map — Generally excess should be divided or deficiency borne by all lots proportionately, but where map of plot shows lots of regular size and a few of irregular size the lots of irregular size are deemed remnants and bear the shortage.— Where land is conveyed by reference to a plan or map, and there is more or less in the entire tract which has been divided than the map shows, no grantee is entitled to any preference over the others and the excess should be divided among or the deficiency borne by all of the lots in proportion to their area. Where, however, a map shows a plotting of a considerable tract and the creation of lots of regular width and depth, if a few of them are of irregular dimensions they are deemed to be the remnant of what remained of the entire tract after plotting the regular lots, and if there is a shortage in the entire frontage, the irregular sized lots must bear it, this, upon the assumption that it was the intention of the owner to get as many regular sized lots as possible and that whatever remained of the frontage was to go into the irregular shaped plot, and hence if he had more or less than the map showed, the difference in the frontage would affect only the irregular lots. A map of a tract of land filed by the owner in the office of the county clerk showing 500 lots or more disclosed that it was his intention to create lots regular in shape with a width of 25 feet and a depth of 100 feet. According to the map the frontage of one of the blocks bounded north by a turnpike, east by an avenue, south by a street and west by the land of another owner, and in which lies the property of plaintiff and defendant, is 211 feet 3 inches along the avenue, but as matter of fact the block measures only 206 feet 2⅛ inches. The owner laid out four lots fronting on the avenue and then, in the belief that there remained 111 feet and 3 inches, he made that the depth of the lot laid out as fronting on the turnpike. All deeds of the property in question, including those from the common owner, referred to the map, and it clearly appeared that neither the plaintiffs nor their predecessor obtained title to a plot that extended 111 feet and 3 inches along the avenue. *Held,* in ejectment, a dis-

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BOUNDARIES — Continued.
pute having arisen as to the location of the boundary line between plaintiffs' and defendants' properties, that plaintiffs did not own 111 feet and 3 inches on the avenue but only 106 feet 2⅛ inches, and that defendants were entitled to judgment, with costs. Mechler v. Dehn, 591.

See **Taxation.**

BROKERS.

1. *Real estate — Contract for division of commissions — "Commission" includes money received for procuring purchase of option — Judgment directed by appellate court where retrial is useless formality.*— In the administration of justice less regard should be had for the lexicon definition of a word and more for what the parties understood the word to mean. An agreement between plaintiff and defendants, all real estate brokers, for a division of commissions earned from any real estate transactions in which they were jointly interested, provided that upon any sale of real estate wherein plaintiff had procured the purchaser, he was to receive fifty per cent of the commission. Plaintiff having brought to defendants an intending purchaser of certain premises, one of the defendants undertook to consummate the sale himself, and in the course of investigation learned that another firm of brokers had an option to purchase the property his customer wanted, and he finally arranged for the purchase of the option by his client at a certain price, for which services the seller of the option paid defendant a certain sum of money, but this fact was never disclosed to plaintiff. *Held*, that the money paid to defendant for the sale of the option was a "commission" just as much as the sum paid by the owners of the property to the brokers upon the sale, which was divided between plaintiff and defendant. It was error, therefore, so far as related to plaintiff's claim to recover one-half of the money so paid to defendants, to dismiss the complaint on the ground that the money thus earned was not within the terms of the agreement, and the judgment rendered in favor of defendant will be reversed, with costs, and as it would be a useless formality to order a new trial, judgment is directed in favor of plaintiff for the full amount claimed, with interest and costs. Stern v. Froman, 180.

2. *Commissions — Lessee held liable for services in procuring lease when commission cannot be secured from the owner.*— The mere fact that a broker was employed by the owner of real estate to procure a lessee therefor does not preclude the broker from being also employed by another to submit to the owner an offer to rent the premises. Defendant at the time he stated to plaintiff, a real estate broker, "If you can get that house for two years for $250 a month I will take it," was aware that the plaintiff would obtain a commission from the owner of the premises. In consequence of defendant's failure to make a certain payment to be made on delivery of the lease, it did not become effective and plaintiff failed to earn any commission from the owner of the premises. *Held*, that defendant's statement was an employment of plaintiff to act as defendant's agent in the matter, and that defendant was liable in

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BROKERS — Continued.
damages for breach of his agreement with the plaintiff, and the judgment in favor of plaintiff will be affirmed. McKnight v. McGuire, 306.

3. *Real estate broker must disclose purchaser — Commissions.*— A broker to sell real estate who refuses to reveal to his employer the identity of the proposed purchaser is not entitled to recover commissions. Sugarman v. Freeman, 624.

See **Stock Brokers.**

CANALS.
See **Eminent Domain.**

CARRIERS.
See **Ships and Shipping.**

CEMETERIES.
See **Taxation.**

CERTIORARI.
See **Taxation.**

CHECKS.
See **Banks and Banking; Bills and Notes.**

CITY COURT OF BUFFALO.
Power to order restitution after conviction for petit larceny — Code Crim. Pro. §§ 483(2), 768 — *New trial ordered.* People v. Funk, 778.

See **Depositions.**

CITY COURT OF NEW YORK.
Practice — Commercial calendar — Breach of contract to manufacture — When consolidation of actions will not be ordered.— The answer in an action brought in the City Court of New York to recover damages for breach of contract upon allegations that defendant improperly manufactured certain shirts, admitted the agreement, denied the other allegations of the complaint, but pleaded no counterclaim. The answer in an action subsequently brought in the City Court by the defendant in the first action against the plaintiffs therein for the manufacture, sale and delivery of the same shirts, denied most of the material allegations of the complaint and set up two counterclaims; one identical with the cause of action set forth in the first action and the other for additional damages and allowances. The second action having been duly placed upon the commercial calendar and entitled to a preference may be promptly reached for trial, whereas the first action may not be tried for over a year. *Held*, that an order for the consolidation of both actions entered upon granting a motion by plaintiffs in the first action and directing that the second action be stricken from the calendar, will be reversed, the motion denied, and the case restored to the commercial calendar. Paparo v. Shulman, 690.

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CIVIL SERVICE.

Eligible list — City of New York — Mandamus — Writ will not issue when unavailing — Civil service commission has no power to revive an expired eligible list — Mandamus does not relate back to time of accrual of right thereto.— Mandamus lies only when the relator has a clear legal right to the remedy and when it is within the power of the officer to whom the writ is directed to perform the required act or duty. The rule that the writ will not issue when it would be unavailing for want of power applies although the want of power is due to the fault of the officer to whom the writ is directed. Where there is no eligible list, the specific provisions in the rules of the state civil service commission or of a local civil service commission for temporary and provisional appointments, negative the contention that either of said commissions has power to revive an expired eligible list. When two motions for peremptory writs of mandamus to compel the civil service commission of the city of New York to certify the names of the relators for promotion to the rank of lieutenants in the fire department were denied on September 29, 1921, and affidavits purporting to show that a certain eligible list for the position of engineer of steamer, which expired July 29, 1920, was thereafter revived and certification made therefrom, were presented upon a motion for a reargument, presumably to show that a precedent exists for the revival of an expired list. *Held*, that the issue raised by a denial of these facts, in an opposing affidavit, was of no relevancy, and the said civil service commission had no power to revive an expired eligible list. A contention that the mandamus proceedings, when instituted, related back to the time of the accrual of the right thereto, held untenable. People ex rel. Walter v. Kaplan, 257.

CLAIMS AGAINST STATE.

1. *Jurisdiction of Court of Claims — Damages — Prison inmate — Immunity of state from liability for torts of its agents is not relinquished by a statute waiving notice of claim — Laws of* 1920, *chap.* 726.— Claimant, an inmate of Clinton prison, while at work in the weave shop was injured by being caught in a moving pulley on which he was attempting to adjust a belt under the direction of the person in charge. *Held*, that while by the statute (Laws of 1920, chap. 726) conferring jurisdiction only upon the Court of Claims to hear and determine the claim for damages, the state had clearly waived its immunity from suit and the due filing of a notice of intention, this was not in and of itself sufficient to substantiate the claim in view of the expressed declaration of the statute that facts establishing liability on the part of the state must be proved as a condition precedent to the making of an award. Claim dismissed for failure to state facts sufficient to constitute a cause of action. Kahn v. State of New York, 186.

2. *Right of state to improve navigability of its waters paramount — State not liable to riparian owners in absence of negligence — Ellicott creek — Claim by owner of bed stream for consequential damages to dock and warehouse dismissed — Laws of* 1809, *chap.* 45; *Laws of* 1813, *chap.* 47; *Laws of* 1913, *chap.* 624.— The rights of riparian owners are subject to the paramount right of the state to improve the navigability of its waters, and in the absence of

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CLAIMS AGAINST STATE — Continued.
negligence, the state is not liable for consequential damages caused by the lawful exercise of such paramount right. During the years 1919 and 1920 claimant was the owner of lands running "to the Ellicott Creek, thence westerly along said Creek" and including all the rights of his grantors in and to "the Ellicott Creek adjoining said premises and to the center thereof." On the water-front of this land had been erected a dock and warehouse, which was partially supported by piling driven into the bed of the river. By statute (Laws of 1809, chap. 45; Laws of 1813, chap. 47) the state indicated its control of the waters of Ellicott creek specifically reserving the navigable rights of the public therein and claimant took title with notice thereof. In April, 1919, in pursuance of and in conformity with chapter 624 of the Laws of 1913 work was being performed by a duly authorized contractor, under the supervision of state officers, immediately in front of claimant's premises. The entire work was completed August 14, 1919, and as a result thereof, on April 16, 1920, a portion of the bed of the creek in front of claimant's premises gave way taking with it a portion of his warehouse. Upon the hearing of a claim for damages there was no proof to sustain the contention that claimant's damages were caused by the negligence of the state. *Held*, that as there had been no invasion of claimant's property upon which direct damages could be predicated, even though claimant was the owner of the bed of the stream at the point in question, the damage suffered by claimant was merely a consequential injury to his right of wharfage, which by implication of law as well as the reservation specifically expressed in the statutes of 1809 and 1813, he held subject to the paramount rights of the public, and the claim for consequential damages will be dismissed. Stegmeier v. State of New York, 626.

See **Eminent Domain.**

CODE OF CIVIL PROCEDURE.
See *ante*, p. xlviii.

CODE OF CRIMINAL PROCEDURE.
Section 618-*b* *is unconstitutional.* People ex rel. Maloney v. Sheriff, etc., 421. See *ante*, p. xlviii.

CONSPIRACY.
See **Injunction.**

CONSTITUTIONAL LAW.
City ordinances — When distribution of handbills not illegal — Constitution of State, art. I, § 8 — Code of Ordinances of the city of New York, § 15, art. 2, chap. 22. — While a city ordinance, within reasonable limits, is proper and should be sustained, no such ordinance, no matter how worthy its intendment, should be permitted in any way to curtail any of the fundamental rights of the citizen. Where the only evidence to sustain a conviction for a violation of section 15, art. 2, chap. 22 of the Code of Ordinances of the city of New York declaring that "No person shall throw, cast or distribute * * * any handbill, circular or other advertising matter whatsoever," etc., was the testimony of the police officers making the arrest, to the effect that defendants were handing out in front of a theatre circulars entitled "Stop the Ku Klux

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CONSTITUTIONAL LAW — Continued.
Propaganda in New York" which were an appeal to the public not to encourage what it was claimed was an effort to glorify through the medium of a moving picture the activities of an organization having for its primary purpose the stirring up of prejudices and animosities against certain races and religions, the conviction will be reversed and the complaint dismissed upon the ground that the defendants in making such public protest were acting within their constitutional rights. (Const. of State, art. I, § 8.) People v. Johnson, 133.

See **Canals**; **Equity**; **Extradition**; **Wills**; see *ante*, p. xlv.

CONTEMPT.

Civil — Non-payment of alimony — Order need not recite that sequestration is unavailng — Habeas corpus — Affidavit held sufficient — Writ dismissed — Civ. Pr. Act, § 1172.— An order adjudging relator guilty of a civil contempt for non-payment of alimony is valid though it does not contain a finding that sequestration is unavailing. Where on the return to a writ of habeas corpus, seeking relator's discharge from imprisonment under an order adjudging him in contempt for non-payment of alimony, no traverse being filed, it appears, from plaintiff's affidavit used on the motion for alimony, that she was informed by her attorney that defendant had a certain interest in some real property which was worth $10,000, and the affidavit further stated that defendant had no other personal property from which sequestration could be made, the requirements of section 1172 of the Civil Practice Act (Code Civ. Pro. § 1773) are met and the writ will be dismissed and the relator remanded. People ex rel. Allen v. Wagner, 526.

CONTRACTS.

Specific performance of land contract — Statute of Frauds.— Where only a part of the terms of a contemplated contract is agreed upon with intention that others are to be left for negotiation, there is no meeting of the minds of the parties. Where all the terms having been agreed upon, nothing remains but to reduce the agreement to writing, the minds of the parties have met even though the formal contract is never executed. In an action to compel specific performance of a land contract it appeared that the parties having agreed upon the purchase and sale of the premises, then and there signed a writing embodying all the terms of their contract. *Held*, that the writing being sufficient within the Statute of Frauds, was enforcible. The fact that the day after signing the writing, upon the suggestion of defendant's daughter that a contract to sell land must be drawn by a lawyer or a notary public, the parties went to the office of defendant's lawyer who dictated certain additional clauses which though advisable were not in the minds of the parties when they signed the writing, did not affect its validity. Where defendant upon tendering back to the plaintiff a cash payment made at the signing of the contract, declared the transaction at an end, specific performance of the contract will be decreed. Eisenberg v. Spachmann, 109.

2. *Sabbath laws — Agreement for instruction, performed partly on Sunday, enforcible — Penal Law*, §§ 2140, 2143.— An agreement to give defendant at his home a course of instruction in named

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subjects, though to be performed in part on Sunday, does not constitute a serious interruption of the repose and religious liberty of the community, does not infringe the inhibition of the Penal Law, sections 2140, 2143, and is enforcible. Key System Institute v. Weissman, 295.

3. *Non-residents — Attachment — Jurisdiction of Supreme Court —General Corporation Law,* § 47.— A written contract between plaintiff, a non-resident, and defendant, a foreign corporation, executed in the state of New York, contained the following provision: "First. It is agreed that while for convenience this agreement is signed by the parties in the City of New York, United States of America, it should be considered and held to be as one duly made and executed in London, England." *Held,* that under section 1780, subdivision 1, of the Code of Civil Procedure (now General Corporation Law, § 47) the Supreme Court of the state of New York has jurisdiction of the action and that a levy under a warrant of attachment of defendant's interest in certain options on oil properties in a foreign country will be upheld. Stagg v. British Controlled Oilfields, Ltd., 474.

4. *Agreement adopting week work system in place of piece work and for reduction in hours of labor — Employers' association adopted resolution in effect to break agreement — Labor union of employees granted an injunction pendente lite — No adequate remedy at law.*—After a contract, to continue until June 1, 1922, made between the defendant, an employers' association, and a labor union of garment workers, which provided for the week work system in the place and stead of the so-called piece work system formerly prevailing in the garment industry, and for a reduction in the hours of labor from forty-eight to forty-four hours per week, had gone into effect and the workers were operating thereunder, the defendant broke the contract by the adoption of a resolution which in part stated: "It has become necessary to substitute in the industry the piecework system for the week-work system, to establish an increase of the number of working hours in the week and to fix a reduction of the wages of the workers in those branches of the industry where, by the nature of the services rendered, it is required that they be retained on the week-work system;" and further: "That in order to bring into full force and effect the above changes in the industrial standards of the industry there be promulgated an order, binding upon every member of this association, that beginning Monday, November 14, 1921, each and every member will operate his factory on the piece-work system and at the scale of wages and for the working week established by the executive committee." This resolution went into effect on October 25, 1921, and ever since has been observed and acted upon by the members of the defendant association. The refusal of plaintiff to accede to the new system of work set up by the employers, as they claimed, in contravention of the collective agreement resulted in what was commonly known as the "garment strike." *Held,* that as under the by-laws of the defendant association its members were bound to and did carry out its directions to repudiate its legal obligations,

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CONTRACTS — Continued.
such act constituted a conspiracy and a violation of plaintiff's legal rights. It appearing that there are over forty thousand workers whose rights are involved and over three hundred members of the defendant association and that the trial of an action to enjoin the violation of the contract or the doing of any act in furtherance of the conspiracy can hardly be had within the lifetime of the contract, the plaintiffs will be granted an injunction *pendente lite,* they having no adequate remedy at law. Schlesinger v. Quinto, 735.

5. *Infant on disaffirmance of executed contract for purchase of an automobile must restore what he received under the contract — Restoration only in part — Must account for reasonable use of vehicle including deterioration in value — An alleged assignment of all rights of the seller under the contract and chattel mortgage given on the sale, unsupported by proof, must fail — Complaint dismissed.* Sparandera v. Staten Island Garage, Inc., 780.

6. *Sale of automobile — Rescinded because of mistaken credit on purchase price — No action lies to recover balance alleged to be due.* Stowell Motor Car Co. v. Hull, 789.

7. *For improvement of state and county highways — Delay and interference with claimant's performance of work — Burden of proof on claimant to rebut presumption that sand was properly rejected because inferior to accepted sample — Award for damages arising solely because of state's default in placing a culvert.* Brennan Construction Co. v. State of New York, 816.

See **Sales; Ships and Shipping.**

CONVERSION.
See **Bailment.**

CORPORATIONS.
1. *Directors — When not individually liable for debt of corporation — Stock Corporation Law,* § 20, *as amended by Laws of* 1920, *chap.* 606, *restricted to corporations with stock of no par value.*— Section 20 of the Stock Corporation Law making directors jointly and ndividually liable for a violation of its provisions, as amended by chapter 606 of the Laws of 1920, applies only to corporations which have no fixed or par value to the shares of stock issued by them. Where a judgment is obtained against a stock corporation for goods sold and the judgment creditor brings an action against one of the directors of the judgment debtor, who was also its treasurer, upon the ground that the corporation had begun business without having paid in its capital stock, section 20 of the Stock Corporation Law, as amended, has no application to the facts, and the action having been tried solely for the violation of the statute, the judgment rendered in favor of plaintiff will be reversed and a new trial ordered. National Doll Outfit, Etc., Co. v. Herbert, 313.

2. *When stockholders entitled to an order of discovery and inspection of the books and documents of corporations — Referee appointed to superintend discovery and inspection — Civ. Pr. Act,* § 1569 — *Rules of Civil Practice, rule* 142.— Under the Civil Prac-

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CORPORATIONS — Continued.
tice Act and the Rules of Civil Practice an order of discovery and inspection of the books and documents of a defendant corporation may be granted provided they relate to the merits of the action. Where in several actions brought by stockholders for an accounting of the receipts, assets and property of the defendant corporations based upon allegations of mismanagement, waste and misappropriation of their property, the court, upon motion for an inspection of all the books and papers of the corporations, is unable to determine when the summonses were served or whether service thereof was made prior to October 1, 1921, on all persons to be served, the court under section 1569 of the Civil Practice Act and in the light of the present Rules of Civil Practice, may, in the interests of justice, apply any remedial provision of said statute not inconsistent with proceedings theretofore taken in said actions. Where from the complaint it was obvious that a discovery and inspection of the stock books, minute books and books of account of the defendant corporation would disclose matters relating to the merits of the actions, and that an order directing the inspection of all other books, papers, registers, certificates and records of the corporations, except a so-called creditors' agreement, would be too sweeping in its scope and was not justified without more definite reference to the particular books or papers and of their relation to the merits of the actions, an order will be granted permitting a discovery and inspection of the creditors' agreement and of the stock books and minute books of the corporations, and also of their books of account in so far as they relate to the specific allegations of misconduct, waste and misappropriation, set forth in the complaint. In accordance with rule 142 of the Rules of Civil Practice and to the end that the business of the corporations may not be unduly interfered with, the order will provide for the appointment of a referee to direct and superintend the discovery and inspection, who shall file his certificate entitled in each of the actions, in the county clerk's office, certifying to the compliance or non-compliance with the terms of said orders, which shall set forth the specific matters alleged in the complaint, concerning which discovery and inspection is directed to be had. Bell v. Gilbert Paper Co. 610.

See **Injunction.**

COSTS.

None in Court of Claims. Banner Milling Co. v. State, 33.

COUNTY COURTS.

1. *Jurisdiction — Residence — A general appearance waives lack of jurisdiction over defendant's person — Civil Practice Act,* § 278. —A County Court may acquire jurisdiction over the person of a defendant even though he be a non-resident of the county wherein the action is brought. A defendant in a County Court action by the service of a general notice of appearance waives his right to question the jurisdiction of the court over his person. Where the defendant has appeared generally in the action his motion for a dismissal of the complaint under section 278 of the Civil Practice Act, upon the ground that it must appear upon the face of the com-

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COUNTY COURTS — Continued.
plaint that he resides in the county in which the action is brought, will be denied, even though the complaint fails to allege that he is a resident of the county in which the action is brought. Gardner v. Condon, 97.

2. *Jurisdiction — When judgment in excess of* $2,000 *may be entered.*— Where the amount demanded by a complaint in a County Court is within the jurisdictional limitation, the jurisdiction to render judgment cannot be defeated by the fact that interest became due during the pendency of the action. At the time a case in County Court was moved for trial, about ten years after the commencement of the action, and six years after the service of the answer, the sum demanded by the complaint, to wit, $1,959.20, amounted to $2,595.10 because of accrued interest. *Held,* upon a motion for judgment, the defendant not appearing, that plaintiff was entitled to judgment for the full amount demanded by the complaint, with interest to date. Tappin v. MacLean, 757.

COURT OF CLAIMS.
See **Claims against State; Eminent Domain.**

COURTS.
Decision should be in harmony with corrective legislation.— The progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, cannot be ignored by the courts, and their decisions should be in harmony with and not in defiance of that modern conception. Schlesinger v. Qrunto, 735.

See **Equity.**

COVENANT.
See **Landlord and Tenant; Mortgages.**

CRIMINAL LAW.
1. *Assault in third degree — Sentence upon conviction in city of New York may be fifteen months imprisonment — Parole Commission Act, as amended in* 1916 *— Discharge on habeas corpus, on ground that under Penal Law, section* 245, *maximum sentence is one year, denied.* People ex rel. Ward v. Joseph A. McCann, Warden, etc., 798.

2. *Bigamy — One legally married who goes through ceremony with another also lawfully married, is guilty of bigamy.*— Where one legally married contracts the second marriage in this sate with one who at the time was also lawfully married he is guilty of bigamy under the laws of the state of New York, and where at his arraignment upon an indictment charging him with the crime of bigamy, he pleads guilty, a motion in arrest of judgment will be denied. People v. Manfredonio, 632.

See **Criminal Procedure.**

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CRIMINAL PROCEDURE.

1. *Murder — Evidence — Weight to be given recantation of witness — Newly discovered evidence — Effect of conviction of recanting witness for perjury — Accomplice — Necessity of corroboration — Conflicting statements — When court need not hear witnesses orally upon motion for new trial — New trial granted because of false tesimony of principal witness for prosecution — Code Crim. Pro.* § 465(7).—After an important witness for the prosecution in a capital case had recanted, the sentence imposed upon defendant was commuted to imprisonment for life. At the time of the argument of a motion for a new trial on the ground of newly discovered evidence, to wit, that the recanting witness had committed perjury on the trial of defendant said witness was awaiting trial under an indictment charging him with such perjury. *Held,* that if the court was satisfied that the recantation of the witness was not of such weight as to require the granting of the motion for a new trial, it was its duty to disregard the verdict of the jury convicting said witness of perjury in the giving of his testimony on the trial of defendant. Upon consideration of the records on the trial of defendant and on the trial for perjury, *held,* that the testimony given by the recanting witness on the trial of defendant, was of such basic importance as to require the court to grant the motion for a new trial, it appearing that the preponderance of evidence, considered apart from the conviction of the recanting witness for perjury shows that he did commit perjury against those charged with the murder; the perjury need not be established beyond reasonable doubt. Where the record discloses that witnesses have already been examined, the court is not called upon to hear them orally as it might under section 465(7) of the Code of Criminal Procedure. The possible reversal of the judgment convicting the recanting witness of perjury on the trial of defendant has no bearing upon the motion for a new trial, need not be considered, and the motion will be granted. People v. Cohen, 158.

2. *Search warrant — Indictment — Police power — Intoxicating liquors — Failure to post copy of warrant upon premises immaterial as to defendant who was personaly served — Evidence — Motion to dismiss indictment denied.*— The use of a search warrant to prevent and detect crime is a valid exercise of the police power of the state. Section 802-b of the Code of Criminal Procedure, added by chapter 156 of the Laws of 1921, is almost a verbatim re-enactment of section 33 of the Liquor Tax Law (Laws of 1900, chap. 39) and no exact or complete rule governs the service of a warrant issued pursuant thereto. There being no direction in section 802-b of the Code of Criminal Procedure as to when the posting of a copy of a search warrant issued hereunder shall be done, an orderly procedure would be the service of the warrant upon the owner or person in charge, the search for and seizure of the liquors, if any are found, making an inventory thereof giving a receipt for the property and posting a copy of the warrant. As the posting of a copy of the warrant is to give constructive notice to anyone having an interest in the liquor seized or its container who was not present when the seizure was made, the exact time of posting is immaterial provided it is done before the officer leaves the premises searched. Upon and for the purposes of a motion by

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CRIMINAL PROCEDURE — Continued.
defendant to vacate and set aside a search warrant issued pursuant to section 802-b of the Code of Criminal Procedure and to dismiss an indictment against him for having unlawfully in his possession cider containing more than one-half of one per cent of alcohol by volume it was conceded that the information upon which the warrant was issued was sufficient, that the warrant was regular upon its face and that a copy thereof was duly served upon defendant but that no copy of the warrant was posted upon the premises as required by section 802-b of the Code of Criminal Procedure. *Held,* that defendant had no cause for complaint because of the failure to post the copy of the warrant upon the premises, and his motion to dismiss the indictment will be denied and the liquor seized or so much thereof as is needed for use as evidence may be retained by the proper officials until the trial under the indictment is finally ended at which time the liquor seized, except such as was properly used for evidence, will be returned to defendant. People v. Wicka, 364.

3. *Witness — Habeas corpus — Constitutional law — Commitment, in default of bail, of necessary and material witness for the people is an unwarrantable interference with the liberty of the individual and unconstitutional — Insufficient affidavit not "proof" — No jurisdiction — Relators discharged — Code Crim. Pro.* § 618-*b.*— The statute (Code Crim. Pro. § 618-b) which provides that "Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the people in a criminal action or proceeding pending in any of the courts of this state, he may, after an opportunity has been given to such person to appear before such judge and be heard in opposition thereto, order such person to enter into a written undertaking, with such sureties and in such sum as he may deem proper, to the effect that he will appear and testify at the court in which such action or proceeding may be heard or tried, and upon his neglect or refusal to comply with the order for that purpose, the judge must commit him to such place, other than a state prison, as he may deem proper, until he comply or be legally discharged," is an unwarrantable interference with the liberty of the individual, and is, therefore, unconstitutional. Where on the return to a writ of habeas corpus it appears that the only attempt to show that the several relators were necessary and material witnesses, was found in the affidavit made by the acting chief clerk in the office of the district attorney, wherein it was stated: "I am informed and believe, the sources of my information being statements made to me by Detective James Cunningham, of the New York Police Department, and therefore say that David Maloney (one of the relators) who is in the State of New York, was present at the time of the commission of the said alleged crime, and is a material and necessary witness for the People herein," such evidence is not only too flimsy, but falls far short of "proof," and the county judge was without jurisdiction to require each of the relators to give an undertaking with sureties for their appearance as witnesses on the trial, and in default of such undertakings to commit them to jail, and the relators are accordingly discharged from custody. People ex rel. Maloney v. Sheriff, 421.

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CRIMINAL PROCEDURE — Continued.

4. *Sentence — Habeas corpus — Defendant cannot show on habeas corpus a change in the decision of the magistrate in imposing sentence — Judgment of commitment reviewable by appeal only — City of New York — Inferior Criminal Courts Act,* § 88(3).— Under section 88(3) of the Inferior Criminal Courts Act, a magistrate in the city of New York, upon convicting a defendant of disorderly conduct, may lawfully impose a sentence of six months in the workhouse, and a warrant of commitment reciting such a sentence is a final judgment, reviewable only by an appeal. A defendant so convicted and sentenced is precluded from showing on habeas corpus that the magistrate, after sentencing him to pay a fine and serve three months in the penitentiary, changed the decision and imposed the sentence recited in the warrant of commitment, and the writ of habeas corpus will be dismissed and relator remanded. People ex rel. Marci v. Hanley, 455.

5. *Discharging bail where indictment for grand larcency pending, not ground for new trial of one convicted of receiving the stolen property.*— Where an indictment for grand larceny is still pending the fact that an order has been entered discharging the bail for defendant is not ground for a new trial of one convicted of criminally receiving the alleged stolen property. People v. Issenoff, 608.

See **Extradition; Intoxicating Liquors.**

DAMAGES.

1. *Permanent appropriation of land for Barge canal — Canal constructed on both sides of the road on which claimant's hotel property is situated — No invasion of property — Consequential damage is damnum absque injuria — Laws of* 1918, *chap.* 612, *not applicable — An award made for appropriation of highway in front of claimant's premises — Filing of notice of intention unnecessary — Code Civ. Pro.* § 264. Derrick v. State of New York, 773.

2. *To owner whose title extends to center of street wholly appropriated by state for Barge canal purposes — Claim allowed.* Marsh, Jr., v. State of New York, 777.

See **Eminent Domain; Sales.**

DECEDENTS' ESTATES.

. *Banks and banking — Dividends on savings bank deposits accruing subsequent to owner's death not principal but income.*— Dividends derived from the earnings of a savings bank which did not accrue to decedent in his lifetime form no part of the principal of his estate but are payable as income to the legatees of income. Matter of Warren Snyder, 371.

See **Executors and Administrators.**

DEPOSITIONS.

City Court of Buffalo — Parties — Laws of 1909, *chap.* 570, § 56 (*as amended by Laws of* 1915, *chap.* 188), § 115 — *Code Civ. Pro.* § 2980.— Statutory provisions relating to the taking of depositions of witnesses, in the absence of specific provision to the contrary,

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DEPOSITIONS — Continued.
are applicable to all witnesses whether they are parties to the action or not. Section 56 of the statute establishing the City Court of Buffalo (Laws of 1909, chap. 570, as amended by Laws of 1915, chap. 188) relates to practice and the regulations thereof and must be read in connection with section 115 of said statute, which relates to jurisdiction. The Code provisions relating to the taking of depositions in Justices' Courts making no distinction between witnesses who are parties and other witnesses, and the jurisdiction of courts of justices of the peace and of said justices having been specifically granted to the City Court of Buffalo, by section 115 of the statute creating said court, a party to an action in said court is a witness within the meaning of said section. An order granted in an action brought in the City Court of Buffalo, under section 2980 of the Code of Civil Procedure relating to the taking of depositions for use in Justices' Courts, made applicable by section 115 of the statute creating said court, directing that a commission issue to take the deposition of the plaintiff, a resident of Brooklyn, N. Y., as a material witness, will be affirmed. Windheim v. Lafayette Hotel Co., 113.

See **Municipal Court of the City of New York; Trusts.**

DISCOVERY.
Inspection of books and documents.

See **Corporations.**

DIVIDENDS.
See **Decedents' Estates.**

DIVORCE.
Decree of divorce in Pennsylvania, the last matrimonial domicile of parties, in which action plaintiff herein was served by mail, is valid and a bar to an action for divorce in this state.— In a husband's action for an absolute divorce it appeared that the last matrimonial domicile of the parties, who had many times been separated, was in the state of Pennsylvania. The evidence was clear that when the defendant, who worked and supported the children, came to the city of Rochester, N. Y., she intended to stay there permanently, only in the event that plaintiff provided a proper home for her there, which he never did. It further appeared that soon after her return to the state of Pennsylvania she obtained a divorce there, in which the defendant in the action was served with process by mail. She returned to the state of New York and married again. Upon directing judgment dismissing the complaint and awarding to her the custody of the children, *held,* that the Pennsylvania divorce was valid and will be given full force and effect in this state. An allegation in the complaint for a separation brought by her in the state of New York that she was a resident of that state, was not sufficient to show that she had abandoned her domicile in Pennsylvania. Moody v. Soper, 439.

See **Guardian and Ward.**

DOMICILE.
See **Divorce; Transfer Tax; Trusts.**

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DOWER.

Release of — Judgment creditor's action — Execution — Judgment not a lien on inchoate right of dower.— A wife cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person. A complaint after alleging the recovery of a money judgment against two married women and the return of an execution *nulla bona* issued upon the judgment, alleged the "possession" by said defendants of an inchoate right of dower in certain described premises the fee of which was vested in their husbands. It was further alleged that by a subsequent conveyance of the premises by said husbands, in which their wives joined, they released their right of dower in said premises, that plaintiff's judgment was a lien against the dower right of the defendant wives and that the grantees took the conveyance subject to the lien of plaintiff's judgment, and the prayer for relief was that the aforesaid judgment, with the accrued interest thereon, be adjudged a lien upon the premises and continue as such, etc. On cross-motions for judgment on the pleadings, *held*, that the motion on behalf of plaintiff must be denied and that of defendants granted and the complaint dismissed. Crawford v. Woods, 150.

See **Adverse Possession; Executors and Administrators; Wills.**

EASEMENTS.

Water pipes — Injunction — Oral agreement — Receipt — When rights pass as appurtenant to land, though not mentioned in deed — Estoppel — Real Property Law, § 243, not applicable — Nominal damages.— Where in an action to restrain the defendant from interfering with pipes laid across his premises to conduct water to plaintiffs' house, the court is satisfied that a writing given by defendant to plaintiffs' predecessor in title acknowledging the receipt of a certain sum of money "for water connection and privilege for two families until water in street is supplied by the city" substantially embodies an oral agreement originally made between the parties several years before, it will be held that such agreement is more than a license and that it is in substance and effect an easement in defendant's land until water is supplied by the municipality in that part of the street in which the premises of plaintiffs are situated. The rights and easement acquired by plaintiffs' predecessor in title to maintain the water pipes, etc., passed as appurtenant to the land upon the conveyance of the dominant estate to plaintiffs although not specifically mentioned in the deed to them. Where by the acts and conduct of defendant and his wife, joint owners of the lot in the rear of the premises of which defendant was the sole owner, plaintiff's grantor was led to believe that defendant was also the sole owner of said rear lot, through which the pipes were also laid and maintained by plaintiffs' grantor to the knowledge of defendant's wife who was present when the money for which the receipt was given was paid to her husband and she made no objection either to the laying of the pipes or to their maintenance or to the supply of water, until about two months after the conveyance of the premises to plaintiffs, when she served upon them a written notice that the water would be shut off in thirty days, the consent of defendant's wife, in the circumstances, will be presumed and defendant estopped from questioning such consent. The servient

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EASEMENTS — Continued.
tenement being still in the same ownership as it was when the pipes were laid, the writing both at common law and under the statute was good as between the parties and a contention that it was ineffectual to pass an easement because it was neither witnessed nor acknowledged, is untenable, as section 243 of the Real Property Law did not apply. Judgment for plaintiff as indicated in the opinion and for nominal damages, fixed at six cents. Singleton v. McGurk, 340.

EJECTMENT.
See **Boundaries; Landlord and Tenant.**

ELECTIONS.
Ballots — Cross mark of four lines held not void. — Upon the canvass of the votes cast at the general election held November 8, 1921, the board of inspectors set apart one ballot as void as to the vote for overseer of the poor of the town of Green Island, because, as appeared upon the examination under an order to show cause, in the square to the left of the name of the Republican candidate for that office, the voter, an intelligent man, made a cross mark consisting of four lines. *Held,* that taking into consideration the admission that such mark could not have been made for the purpose of identification and that the voter's hand was somewhat tremulous, that he voted a split ticket, the ballot should not have been declared void, and an order will be granted directing a recanvass of the vote for overseer of the poor by correcting the same in accordance with the decision hereon. Matter of Joseph H. Bennett, 73.

EMINENT DOMAIN.
Adverse possession — Canals — Laws of 1848, *chap.* 213 — *Canal property held by state as sovereign cannot be lost by adverse user — Constitutional law — State Const. art.* 7, § 8 — *Compensation for established business — "Property" does not include good will — Laws of* 1911, *chap.* 746 — *Damages for appropriation of structures — Claims against state — Laws of* 1918, *chap.* 606 — *Jurisdiction of Court of Claims — Code Civ. Pro.* § 264 — *No costs in Court of Claims — Code Civ. Pro.* § 274. — Claimant, a domestic corporation, for many years previous to 1917, was the owner of a parcel of land in the city of Buffalo, having a frontage on a street of over 200 feet and extending back to the "blue line" defining the "Ohio Basin," state property, which ever since its construction has been used for the accommodation of the boats and commerce of the Erie canal, with which it had water connection. Since 1887, claimant had conducted a very successful business in the manufacture of flour and during the last ten years of its operation the annual profits had averaged more than $50,000. Although the northerly portion of claimant's property, sixty-six feet in width, was unoccupied by buildings, its plant comprising various structures was fully equipped for operation. Pursuant to statute (Laws of 1911, chap. 746, as amended) the state on April 7, 1917, without notice of intention, made a permanent appropriation of the property of claimant, serving a notice thereof upon it, and also a map describing the property to be taken by metes and bounds, which defined the distance from the east line of the street to the "blue line" on the westerly side of the "Ohio Basin" as eighty-five feet,

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EMINENT DOMAIN — Continued.
which the state contended was the depth of the property of claimant, as against its contention that said "blue line" is distant ninety-one and four-tenths feet from the street. On the strip in dispute, to which claimant has no record title, and more than eighty-five feet from the street stood claimant's dock, canopy and elevator leg and a portion of the elevator building, of the boiler building, of the storehouse and of the barn. *Held*, that the "Ohio Basin" having been by the statute (Laws of 1848, chap 213) authorizing its construction, made a part of the Erie canal system, and its alienation prohibited by article VII, section 8 of the Constitution of the state, said strip of land in dispute, which is a part of the "Ohio Basin," was held by the state as sovereign, not as proprietor, and could not be lost to the state by claimant's adverse user, and claimant cannot recover for the appropriation thereof by the state. The state having allowed the structures erected by claimant on said strip of land to remain unmolested for more than thirty-five years without claimant being required or notified to remove them, was liable in damages for its actual appropriation of said structures. After said appropriation by the state claimant continued to operate its mill until June 13, 1917, in order to consume the stock of grain in the elevator, and thereafter until December, 1917, when it ceased business, occupied the mill as a warehouse, buying flour and shipping it out under its own order until it could no longer secure flour owing to war conditions. *Held*, that considering together as items of damage the "going value" and "good will," which confessedly in legal contemplation included the "going value" of claimant's plant and business, which it was contended the state had destroyed by its appropriation, claimant had failed to establish that said appropriation had either destroyed or impaired the good will of claimant's business, although the proof disclosed that there was difficulty in finding a site in Buffalo which satisfied claimant and in completing the equipment of a plant there, during the period between the appropriation and the time when claimant was obliged to vacate the property, and that the conditions subsequent to the appropriation were such that the creation of a new plant and equipment was impossible or prohibitively expensive. The word "property" as used in the Constitution and in condemnation statutes generally does not include good will and should not be construed to include it under chapter 746 of the Laws of 1911 and chapter 606 of the Laws of 1918. The fact that on December 1, 1917, the canal board by resolution authorized the state engineer and surveyor to take such steps as he might deem necessary for the protection of the property, either by insurance or watchman, and who availed the state of the insurance then in force, upon which claimant had paid the premium, established no liability on the part of the state for like expenditures made by claimant up to December 4, 1917. The liability of the state for like expenditures after December 4, 1917, if any, is an express contract submitted by law to another officer for audit or determination, a claim for which, under section 264 of the Code of Civil Procedure, this court is without jurisdiction to hear and determine, unless the claim has been rejected by the proper tribunal or officer. Award made to claimant with specification of items, aggregating a total award of $235,000, with interest from the date of the appropriation, but by

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EMINENT DOMAIN — Continued.
virtue of section 274 of the Code of Civil Procedure, without costs and disbursements. Banner Milling Co. v. State of New York, 33.

EQUITY.

Police duty not within its province — Injunction pendente lite not granted to restrain continuance of strike where plaintiffs broke contract with employees — Constitutional law — Right to picket — Right to refuse to hold conversation.— A court of equity is not a police station and while the court will always use its powers to prevent the infliction of irreparable injury, there should not be imposed upon it the ordinary performance of police duty. Upon a motion to continue an injunction *pendente lite* to restrain the continuance of a strike, affidavits stating that individual defendants have been guilty of acts of violence, of truculence, of the use of opprobrious epithets, and of interfering with plaintiff's employees, considered in connection with the emphatic denials of the accused defendant, are not of that convincing character which justifies the intervention of equity. Where it appears that the plaintiffs, themselves, in attempting to reduce the wage scale provided for in a collective bargaining contract to which they with others and the defendant labor union were parties, have broken the contract without the consent of the parties thereto and without resorting to the readjustment machinery agreed upon, the motion will be denied and the injunction dissolved. The right to picket is founded on constitutional principles and no sound principle of law prohibits orderly picketing or that which does not infringe upon the rights of others, and whether one or several pickets be maintained is not material. It is also the constitutional right of every person to refuse to hold conversation with others. Segenfeld v. Friedman, 731.

See **Mortgages.**

ESTOPPEL.

See **Easements; Executors and Administrators.**

EVIDENCE.

1. *Negligence — testimony that train started with a "terrible jerk" admissible.*— In an action to recover for personal injuries the plaintiff should not be prevented from testifying in her own language as to how the accident happened, and in any terms which appropriate questions of her counsel may call for. On the trial of a wife's action to recover for personal injuries, and in her husband's action for loss of her services by reason of the injuries to her, she testified that after boarding a train operated by the defendant company it started with a "terrible jerk" which caused her to fall. At the instance of defendant's counsel and over the objection of plaintiffs' the phrase "terrible jerk" was stricken out. Later she described it as "a terrible and terrific jerk," which was stricken out. Her counsel then asked her: "Was it the usual jerk? A. No." This was similarly stricken out as a conclusion. Finally, her counsel said: "Q. You will have to describe, leaving out the words 'terrible' and 'terrific,' in what manner that jerk of the starting of the train differed from the starting of other trains that you had been riding in." An objection to this question was similarly sustained as calling for a conclusion. The husband testified that the chain connecting the cars "gave a terrible snatch." This testi-

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EVIDENCE — Continued.
mony was also stricken out and in dismissing the complaint for failure on the part of plaintiffs to prove negligence, the trial judge said: "There is no evidence here which will show that this jerk was any more than the usual jerk which the plaintiff admits cars start with," and added: "I have stricken out the characterization of the jerk because the decisions compel me to do so." *Held,* that the phrases stricken out should have been allowed to stand, and the wife should have been permitted to answer how the jerk which threw her differed from the ordinary starting jerk of a train, if it did, and the judgments entered upon the dismissal of the complaints at the close of the plaintiffs' cases will be reversed and new trials granted. Fellows v. Interborough Rapid Transit Co., 64.

2. *Landlord and tenant — Summary proceedings — An unfair attempt to arouse sympathy of jury cannot be met on cross-examination by an attempt to arouse their prejudice.*— On the trial of a summary proceeding the tenant testified that in a conversation with one of the landlords he was asked for an increase of rent and when he refused was told that if he did not pay something in addition on the rent he would not be able to stay in the premises "the whole time" and that he answered "I got a wife and eight children to support. Now after I put so much money in the building why don't you leave me alone and give me a chance to live? I pay always my rent on time, why bother me? I got a straight lease from the beginning. I got a straight lease for five years now. After five years, then you get the building. You got enough." No motion to strike out this testimony was made, neither did counsel for the landlords ask the trial justice to admonish the jury that they must not be influenced by any claim for sympathy on the part of the tenant. The tenant was asked on cross-examination how many leases he had and how many houses he owned and when his counsel took the objection that it was incompetent, irrelevant and immaterial, the court stated that it did not see the purpose of the question. The landlords' counsel then said: "This man had volunteered the information — and he did not do it of his own accord — that he was a man with a family of eight children — a poor man with eight children to support. My purpose is to show that this man is a man that has any number of houses that he owns in fee and dozens of houses on lease, and is a very rich man." The court stated that it made no difference whether the man was rich or poor, but when the landlords' counsel added, "I agree with your Honor entirely and I would not have brought it in out of the mouth of my client, but since he has brought it in and placed himself on the sympathy of the jury — " the objection made by the tenant's counsel was overruled. *Held,* that such ruling was prejudicial error, for which the final order awarding possession of the premises to the landlords will be reversed and a new trial ordered. Felstiner v. Widelitz, 289.

3. *Sales — Contracts — Jurisdiction — Damages for breach of guaranty of condensed milk — Survey report filed with clerk of court in Belgium held not prima facie evidence of contents — Not duly authenticated according to Code of Civil Procedure, § 957 — Nothing to show that foreign court acquired jurisdiction of defendant.*— Defendant by its contract of sale and delivery to plaintiff

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EVIDENCE — Continued.
for shipment to Belgium of three hundred cases of condensed milk guaranteed it for a period of six months from the date of shipment against "swells, coagulations, etc." Upon the trial of an action to recover damages for breach of the guaranty, defendant gave no evidence and the only question submitted to the jury was the amount of plaintiff's damages. A survey report filed with the clerk of the Court of Commerce of Brussels, in a case brought by plaintiff's principals against the defendant herein, and duly certified over the seal of the American consul at Brussels, sufficiently identified milk as that covered by the complaint herein, and in said report it was stated that certain of the cans had bulged, that the milk therein had fermented and was unsuitable for human consumption, and the loss was estimated at two-thirds of the full shipment. The trial court upon proof as to the law of Belgium held that the survey report, a copy of which, before the commencement of the present action, was sent to defendant in response to its request in a letter to plaintiff's principals, to supply defendant "with a full and complete affidavit signed by the American consul in Brussels before we can obtain the necessary action in connection with the manufacturers," was *prima facie* evidence of its contents. *Held,* error. Upon reversing a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial, *held,* that aside from the points of lack of due authentication of the survey report in accordance with section 957 of the Code of Civil Procedure, and as to the proper custodian of such document, the objection that there being nothing to show that the Belgium court acquired jurisdiction of the defendant the court on appeal was not warranted in considering the statements in the survey as evidence against the defendant, was well taken. Broeniman Co., Inc., v. Liberty E. & I. Corp., 579.

See **Depositions.**

EXECUTORS AND ADMINISTRATORS.

1. *Wills — Dower — Widow conveying real estate as sole executrix and trustee under a power of sale in her husband's will is estopped from thereafter claiming dower although the will did not declare that the provisions made for the widow were in lieu of dower, the deed reciting that she conveyed all the estate which she had power to convey, whether individually or by virtue of said will — Real Property Law,* §§ 245, 256.— The husband of plaintiff devised to his executors and trustees, with a valid power of sale, certain real property in trust for his wife and children in different proportions but the will did not declare that the provision for the widow was in lieu of dower. Nine years after the death of the husband the widow, acting as sole executrix and trustee, conveyed certain of the devised premises to the predecessors in title of defendant by a deed reciting that she conveyed "all the estate therein which the party of the first part has or has power to convey or dispose of whether individually or by virtue of said will or otherwise." *Held,* that where in an action by her to establish and recover a dower interest in the property, brought after the defendant had undertaken a substantial improvement to the property, it appeared that plaintiff had never entered upon the premises or made any other attempt to establish her dower therein. a judgment will be granted in favor

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EXECUTORS AND ADMINISTRATORS — Continued.
of the defendant. The above quoted language of the deed being verbatim that of section 256 of the Real Property Law which, read in connection with section 245 of the same statute, is a complete answer to plaintiff's claim, estops her from claiming any interest in the land. If plaintiff deems it advisable to now assert a claim for dower it is her duty both in law and equity to assert it against the proceeds of sale received by her grantee, and not against her grantee's assigns. Stephens v. Craigen Co., 418.

2. *Action on contract — Submission of claim unnecessary — Decedent Estate Law,* §§ 116, 117. de Planter v. de Kryger, 795.

EXTRADITION.

Habeas corpus — Criminal procedure — Identity — Constitutional law — Regularity of process — When fugitive from justice will be surrendered — Presumption as to discharge of official duties by executive — Evidence — Validity of indictment can be raised only on trial.— Where extradition papers are regular and contain a sufficient charge of crime, and it adequately appears that the relator is the person named in the indictment and that he was within the demanding state on the day stated in the indictment as the date of the crime, the governor of the state in which the fugitive is found, in the discharge of the imperative duty imposed by the Constitution of the United States, must surrender the fugitive into the custody of the agent of the demanding state. Upon the return made to a writ of habeas corpus, that relator was held under and by virtue of a rendition warrant issued by the governor of the state of New York authorizing and commanding the arrest of relator and his surrender to the agent of the state of North Carolina, as a fugitive from its justice, the only questions before the court are whether the relator is unlawfully deprived of his liberty and whether the governor of this state in honoring the demand for relator's surrender, has acted without authority of law. The relator is bound to overcome the presumption that the governors of the two states have performed their duties under the laws of the United States, and it is not enough for him to show that the indictment is defective under the laws of New York. Where the name of the relator and that of the person named in the rendition warrant are identical, the presumption of *idem sonans* arises. An extradition proceeding is a summary one to be kept within narrow bounds, and, where the papers required by the statute are in proper form, the only evidence admissible is such as tends to prove that the alleged fugitive from justice was not in the demanding state when the crime charged in the indictment against him is alleged to have been committed. What motive induced the relator, a negro, to leave the state of North Carolina, the demanding state, is wholly immaterial, and even if it be assumed to be true that his only reason for leaving the state was because he was threatened with mob violence, he is none the less a "fugitive from justice" within the meaning of the constitutional and statutory provision concerning extradition. The point that the indictment is invalid because, in violation of the Constitution of the United States and of the Constitution and laws of the demanding state, negroes were excluded from the grand jury which found the indictment, is a matter which can be raised only on the trial of the indictment. People ex rel. Whitfield v. Enright, 448.

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FRAUD.
See **Marriage.**

GUARDIAN AND WARD.
1. *Infants — Divorce — When mother and another will be appointed coguardians of the property of infants — When Surrogate's Court will not make order appointing guardian of the person of infants pending a divorce action.*—Where, in a pending action for a divorce, the court has made an order as to the custody of infant children, the Surrogate's Court having due regard to the orderly course of procedure will make no order relating to the guardianship of the person of said infants. Where the answer to the petition of each of said infants for the appointment of their mother as guardian of their person and estate alleges that the father has in his possession certain property belonging to each infant and that the mother is "wholly without experience in business affairs or in the management or investment of property and is, therefore, not a proper and suitable person to be appointed guardian of the property of said infants," the best interests of the infants will be served by appointing the mother jointly with another well fitted to assist and advise her in administering the property of the infants, and it is so ordered. Matter of Stillman Infants, 61.

2. *One of full age by law of her domicile, though a minor by the law of New York, is entitled to receive her property here.*— The law of New York that the term of office of a guardian expires when the ward attains the age of twenty-one years only affects a ward domiciled in New York state. A resident of and of full age — eighteen years — in the state of Illinois is entitled to a decree revoking letters of her guardianship in the state of New York, under the laws of which she is a minor, and requiring the guardian to account for and pay over to her forthwith her property in this state. Matter of Honeyman, 653.

HABEAS CORPUS.
When question as to change of sentence may not be raised on. People ex rel. Marci v. Hanley, 455.

See **Contempt; Criminal Law; Criminal Procedure; Extradition.**

HIGHWAYS.
Nuisance — Unreasonable obstruction of a street constitutes a public nuisance — Injunction.— The primary purpose of a street is for traveling, and whatever causes an unreasonable obstruction or interference therewith constitutes a public nuisance. Where in an action to restrain defendant, a board of trade corporation, from unlawfully occupying and obstructing a street within the financial district of the city of New York, it is clearly established to the satisfaction of the court that plaintiffs are being subjected to special damages by reason of the defendant and its members continuing to conduct in said street, in the immediate neighborhood of plaintiffs' properties located on said street, an open air market for the sale of securities, a motion for an injunction *pendente lite* will be granted. Such occupancy of the street by defendant and its members for business purposes constitutes a flagrant public nuisance,

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HIGHWAYS — Continued.
and had the police, as in duty bound, removed from the street all persons attempting to use it for trading purposes in the manner complained of, the application for injunctive relief would have been unnecessary. Broad Exchange Co. v. Curb Stock, etc., Market, 82.

See **Contracts.**

HUSBAND AND WIFE.

Separation — Alimony — Security — Modification of judgment — Civil Practice Act, § 1170.— Where the defendant in a separation action is unsuccessful and the referee to take proof of the financial resources of the defendant and to report to the court the amount necessary to be allowed for the support of the plaintiff and the three minor children, issue of the marriage, recommends allowances which upon the evidence seem to be suitable and just to both parties to the action, the court upon motion to confirm the referee's report will substantially adopt his findings. Where the referee upon making a finding that the present income of the defendant is from $17,000 to $20,000 per annum, recommends a yearly allowance of $8,400 for the support of the wife and children, and it appears that the defendant was a man of considerable means and of good standing in the business community, the court will not presently require him to give security for his obedience to the directions which the court may give in respect to the payment of allowances, as upon it being made to appear that defendant's income has materially increased, the judgment upon leave granted, may be modified in the manner provided by section 1170 of the Civil Practice Act. Where defendant expresses his willingness to permit the plaintiff and her children to continue in the occupancy of his house where they are now residing until it was sold, he should not be obliged to pay a stated sum a year rent in lieu of such occupancy as recommended by the referee. Rosenwasser v. Rosenwasser, 123.

See **Divorce; Marriage; Negligence; Wills.**

INDICTMENT.

Validity of cannot be raised in an extradition proceeding. People ex rel. Whitfield v. Enright, 448.

INFANTS.

Guardian — Service of process — Service on general guardian of property of non-resident infant insufficient — Application for guardian ad litem denied as premature — Civ. Pr. Act, § 225.— The "guardian" specified in section 225 of the Civil Practice Act does not include a general guardian of the property of an infant, appointed by a decree of the Surrogate's Court. An application, therefore, by such a guardian to be appointed guardian *ad litem* of a codefendant, an infant under the age of fourteen years, will be denied as premature, it appearing that service of the summons and complaint has not in fact been made on the infant by delivery thereof to said general guardian. Hewitt & Co. v. Farmers Loan & Trust Co., 444.

See **Contracts; Guardian and Ward; Parent and Child.**

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INJUNCTION.

1. *Public health — Delivery of milk cannot be subservient to controversy concerning wages.*— The health of an entire community must not be made subservient to the right or wrong of a controversy concerning wages. Any organized effort to interfere with the uninterrupted delivery of the milk supply to the people of the city of New York is an act of hostility to the public weal and will be enjoined. Gottlieb v. Matckin, 128.

2. *Unfair use of corporate name — Charitable institution restrained from using name and from advertising so as to lead public to confuse its activities with those of an earlier established like institution.*—An injunction may be granted to restrain an unfair and a misleading use of a corporate name. In an action by the "Brooklyn Hebrew Home and Hospital for the Aged," a duly organized membership corporation, well known in Brooklyn where it has long labored in its particular field of care of aged and infirm Jewish people, having in 1920 paid more than $60,000 for the maintenance for its home and hospital, to restrain the officers and agents of the "Jewish Home for Aged and Infirm," a Mount Vernon institution which has transferred its activities to the borough of Brooklyn, from using its corporate name so as to lead the public to believe that both institutions are one and the same, an injunction *pendente lite* will be granted enjoining defendant from circularizing and advertising in such a manner as to confuse the public as to the identity of both institutions and from holding its affairs, social and charitable, in such a way as to deceive the public and lead it to believe that the public affairs held by the defendant and by the plaintiff are one and the same. Brooklyn Hebrew Home, etc., v. Jewish Home, 347.

3. *Leases — Rights of riparian owners — Defendants enjoined from hunting on shore of lake where hunting privileges were leased to plaintiff by owner of uplands.*— While hunting upon and fishing in navigable waters are incidental to the right of passage over them, the enjoyment of these incidents to navigation does not in any event justify the continuous use of the shore. A lease to plaintiffs from the owner in fee of certain premises, whose title did not extend to any part of the land under water, described the property as the land "which borders or has a frontage on Cayuga Lake and is known as Judsons Point." The lease further recited that it was understood that the lessees acquired no right in the land except for hunting and trapping purposes, for which the lessees agreed to pay a stated annual rental. In an action to restrain defendants from hunting upon a portion of the shore in which plaintiffs claim the exclusive privilege of hunting under their lease, the answer alleged that the title to the waters of Cayuga lake, including the bank and the shores thereof, is vested in the people of the state of New York and that at the times mentioned in the complaint defendants were hunting on state property. It was proven on the trial that on different occasions between certain dates all of the defendants hunted ducks from a hide or blind from that part of the lake shore included in plaintiffs' lease, and when requested to desist, refused to do so; it was also established that the premises were duly posted pursuant to the Conservation Law. *Held,* that assuming that

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INJUNCTION — Continued.
defendants' contention as to the ownership of the soil was true, and interpreting their conduct by the most favoring rules, their position was untenable, and plaintiffs are entitled to judgment for the relief demanded in the complaint. Certain exhibits excluded after decision reserved as to their competency, and defendants given an exception to the ruling. Stewart v. Turney, 398.

4. *Waste — Landlord and tenant — Equity — Landlord can restrain tenant from materially changing nature of building, though value enhanced by alteration — Mandatory injunction granted directing assignee of lease to restore premises.*— The rule of the common law that a tenant is guilty of waste if he materially changes the nature and character of the building leased, even though the value of the property is enhanced by the alteration, is still the law in this state. Without the consent of the owners in fee or of the mortgagee in possession, a corporation whose only asset was an assigned lease of corner premises in the city of New York completely changed the interior arrangement of the rear or westerly end of the premises by removing some partitions and erecting others, and by placing the wooden framework for a store front on one side of the building at or near the place where there had been two brick piers before their removal by the corporation in compliance with an order of the building department. In an action to restrain waste the relief asked for was a mandatory injunction directing the restoration of the premises to the original condition. *Held,* that the assignee of the lease was chargeable with knowledge of the law, and must be held to strict accountability for its acts, and the plaintiffs granted the judgment as prayed for, with a further direction that no further alterations be made without the consent of plaintiffs. The order of the building department which expressly directed that the brick piers, after removal, be properly replaced and rebuilt in a secure and lawful manner, was no protection to the assignee of the lease, nor was the advice of its counsel that it could make the alterations complained of, an excuse. A contention of the assignee of the lease that the injunction would interfere with its rental profits is not entitled to consideration because there being no adequate remedy at law equity would intervene to protect the plaintiffs' rights. McDonald v. O'Hara, 517.

5. *Conspiracy — Labor unions — Mandatory injunction granted requiring former drivers of milk wagons to surrender route books —Books deposited in court for inspection by both parties.*— By a contract of employment between the plaintiff milk companies and the drivers over their various milk routes, providing that each driver should receive a salary and commissions on collections, it was agreed that the driver should fully account for and pay over to his respective company such collections and should deposit a certain sum, in some cases $150 and in some cases less. It was the duty of the respective drivers to enter in the route book delivered to them by the plaintiff companies the various sales effected by said drivers during the month and at the end of the month to turn back to the company the books, balance to show the amount due to the respective companies from the customers dealt with by

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INJUNCTION — Continued.
the respective drivers. The drivers who are members of the local labor union went on strike the last day of October, 1921, and with substantial unanimity refused to turn in the route books. In an action charging the president and members of the local union with conspiring to withhold the route books, the prayer for judgment contained the following: "That defendants be required to surrender and deliver all route books in their custody and possession to the respective plaintiffs issuing them." *Held,* that though the court was satisfied that a mandatory injunction requiring the defendants and each of them to deliver the route books to the control and possession of the plaintiff companies was proper, yet because each of the individual drivers by virtue of the entries made by each, of his October sales, has also the property rights or interest in the book issued to him, the relief demanded by the complaint should be modified so as to direct that the defendant local unions, their officers, agents, and each and every one thereof who had not returned their books to the respective plaintiff companies, shall deposit said books in court, where, under the order of the court, either side may have such proper access to them as may protect the interests of each of them. Borden's Farm Pro. Co., Inc., v. Sterbinsky, 585.

See **Easements; Equity; Highways; Municipal Corporations.**

INSURANCE.

Disability policy — Incurable malady — Incompetent person — Weekly indemnity for "confining disability" allowed patient at institution for insane — Amount based upon assured's expectancy of life not recoverable — Going from building to building within grounds not evidence that assured was not confined.—Where shortly after the defendant had issued a teacher's life, indemnity, accident and health disability policy, the assured, who is suffering from an incurable malady, was duly adjudged an incompetent and has since been confined in a public institution for the insane, an action to recover an amount based upon the assured's expectancy of life, as shown by the Northampton tables, is not maintainable. The defendant, as evidenced by the policy, agreed that "if the assured suffers confining disability the company will pay * * * for the period of said disability not exceeding 52 weeks" a certain amount per week, and "if the assured suffers non-confining disability the company will pay the assured as follows for the part of said non-confining disability, if any, within 52 weeks from the beginning of the preceding confining disability" the sum of five dollars per week, and "after the said 52 weeks so long as the assured lives and continuously suffers said confining disability" the sum of two dollars and fifty cents per week. In an action brought by the committee of the assured to recover damages based upon her expectancy of life the undisputed evidence was that the incompetent is now and since her commitment to the institution has been continuously confined there undergoing the usual course of treatment. *Held,* that the mere fact that in doing the work of a laundress she has gone from building to building under the care of a supervisor and within the grounds of the institution, was no evidence that she was not necessarily confined, and that upon the proof, plaintiff was entitled to judgment for the maximum amount of the weekly

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INSURANCE — Continued.
indemnity for a period of fifty-two weeks and for one-half the weekly indemnity for the following fifty-two weeks, and one-quarter of the weekly indemnity up to the time of the trial of the action and in addition thereto the sum of fifty dollars for hospital charges, about which there was no dispute. Donlen v. Fidelity & Casualty Co., 414.

See **Mortgages.**

INTOXICATING LIQUORS.

1. *Search and seizure — State rights — Concurrent jurisdiction — State, not federal, decisions controlling — Proceeding under section* 802-b *of the Code of Criminal Procedure in rem not criminal proceeding — Proof by fair preponderance of evidence not beyond reasonable doubt — Issue should be raised by answer, not by special motion to vacate search warrant — General entrance to building sufficient description for search of whole premises — Section* 801, *Code of Criminal Procedure, not applicable — Affidavit — Inventory.*— The statute authorizing the seizure and forfeiture of liquor kept for unlawful traffic (Code Crim. Pro. § 802-b, added by Laws of 1921, chap. 156) is but a re-enactment, almost verbatim, of section 33 of the old Liquor Tax Law, and was a part of the law of the state long before the Eighteenth Amendment to the Constitution of the United States was seriously contemplated. Upon the passage of the said amendment the states did not lose any of their police power over the regulation of the liquor traffic, except the right to enact statutes not in accordance with said amendment, and the federal government acquired thereby only concurrent and not exclusive jurisdiction in the enforcement of laws relating to the liquor traffic; where, therefore, a seizure of liquor is made under and by virtue of the authority of the state of New York the trial court is bound by the decision of the appellate courts of this state and the decisions of the federal courts are not controlling. A proceeding under section 802-b of the Code of Criminal Procedure is to be treated as one *in rem* and not as a criminal proceeding, and the state need only prove its case by a fair preponderance of evidence and not beyond reasonable doubt. Where by the search warrant issued pursuant to section 802-b of the Code of Criminal Procedure notice was given to all persons claiming any right, title or interest in liquors seized thereunder, in a hotel, or in any vessels containing the same or in the property designed for the sale of such liquor, the only way an issue may be raised on the order to show cause why the properties should not be forfeited to the state of New York is by answer, and an objection to a special motion to vacate and set aside the warrant, made by the corporate owner of the hotel property and its president and general manager, is well taken. Where, however, the issues raised on the motion would doubtless be raised by answer and have to be tried, it is immaterial as a practical matter whether they are decided upon objections raised by a special appearance or at a trial. Where all of the street numbers upon the hotel property ran from 7 to 17 inclusive, all of the building being used for hotel purposes, the search warrant though it referred only to No. 9, the general entrance for patrons, gave a clear right to the officer to search the whole premises. Sec-

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INTOXICATING LIQUORS — Continued.
tion 801 of the Code of Criminal Procedure has nothing to do with the service of a search warrant issued pursuant to section 802-b of said Code, and an objection that the officer in serving the warrant did not comply with the former section is futile. Where it is admitted that the officer making the search left a complete inventory of the property taken which can be identified as the receipt left by him, an objection that the inventory was not signed is untenable. An objection that the search warrant was granted upon an affidavit and not upon a complaint is not valid where the same information is found in the affidavit, properly sworn to, that would be found in a complaint. Motion to vacate and set aside the search warrant and for a return of the property seized denied, and, as the objections raised were in the nature of a demurrer, with leave to defendants to file an answer within the time limit stated in the stipulation heretofore entered into. Matter of Holcomb, 356.

2. *Seizure without warrant in private dwelling — When writ of prohibition will not issue to restrain replevin — Code Crim. Pro.* § 802-*b*.— Where, without a search warrant, liquors are seized in and taken from the private dwelling of the owner of the liquor, an action in replevin lies, and a motion to restrain the trial of the action pending the disposition of a proceeding *in rem* under section 802-b of the Code of Criminal Procedure against the liquor so seized, will be denied. People ex rel. Wallace v. Christmann, 528.

See **Criminal Procedure.**

JOINT TENANCY.
See **Transfer Tax.**

JUDGMENT.
1. *Motion for summary judgment — Moving affidavit held insufficient — Practice of submitting successive affidavits disapproved — Rules of Civil Practice, rule* 113.— Where to a complaint alleging an account stated the answer is a general denial, the case is not within rule 113 of the Civil Practice Rules, and a motion by plaintiff for summary judgment will be denied. Upon a motion for summary judgment under rule 113 of the Civil Practice Rules the practice of submitting successive affidavits, piecing and stringing out the assumed right to such a judgment, resolves itself into a trial by affidavit and creates a condition which ought not to obtain, and is, therefore, of doubtful propriety. Twigg v. Twigg, 154.

2. *When not a lien on inchoate right of dower.* Crawford v. Woods, 150.

3. *Direction for by appellate court.*
See **Brokers.**

JURISDICTION.
See **Contracts; County Court; Divorce; Evidence; Maritime Law; Process; Taxation; Wills.**

JURY TRIAL.
See **Landlord and Tenant; Wills.**

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LABOR UNIONS.
See **Injunction.**

LANDLORD AND TENANT.
1. *Constructive eviction — Sub-tenant — Surrender — Covenant to supply steam relates to premises and is impersonal — When waiver of right to abandon premises will be submitted to a jury.*— A covenant in a lease to furnish live steam for the necessary use of the tenant in the conduct of its business relates directly and exclusively to the premises demised and is altogether impersonal. Defendants, the lessees of plaintiff's building for a term ending February 1, 1919, sublet one of the floors for a term ending simultaneously with the main lease and covenanted to supply their sub-tenant with steam in a certain amount and at a certain pressure. The main lease was cancelled by mutual consent and an agreement entered into by which defendants, in addition to the payment to plaintiff of certain sums at fixed intervals, guaranteed that the rentals of certain named tenants, including said sub-tenant, would be paid to plaintiff until the expiration of the lease. Beginning early in January 1919, the complaint of the sub-tenant concerning a deficiency in the supply of live steam continued from time to time and was followed by plaintiff's promises of improvement. On August 26, 1918, the sub-tenant by letter formally notified plaintiff that because of the failure of steam it had lost one of its government contracts and demanded immediate attention to the defect. The letter not having been answered, the sub-tenant on September tenth, following, notified plaintiff that it had been compelled to secure other quarters and would hold plaintiff for its loss. The sub-tenant having later abandoned the premises this action was brought to recover on defendants' guarantee, the rents for the months of December, 1918, and January, 1919. *Held,* that upon the surrender by the defendants and the acceptance by the plaintiff of the lease between them, the plaintiff both as matter of law and as matter of fact assumed the performance of the covenant to supply live steam to the sub-tenant and a judgment entered upon the dismissal of the complaint at the close of the plaintiff's case will be reversed and a new trial granted. Defendants were entitled to have the question whether the sub-tenant had not waived its right to abandon the premises with sufficient promptitude, submitted to the jury as requested. Rhinelander Real Estate Co. v. Cammeyer, 67.

2. *Summary proceedings — Ejectment — Jurisdiction — When summary proceedings cannot be maintained — Code Civ. Pro.* § 2232 *—Civil Practice Act,* § 1411(4).— It is essential to the maintenance of summary proceedings instituted under section 2232 of the Code of Civil Procedure, now section 1411(4) of the Civil Practice Act, that the one sought to be removed has "intruded into" or "squatted upon" the premises, and has continued to occupy the same without permission which if ever granted has been revoked upon notice to the intruder or squatter. Defendant was given permission to occupy plaintiff's residence and use the furniture as a guest during plaintiff's absence upon condition that he would vacate the premises at any time upon the request of plaintiff. Defendant occupied the premises for several months, and notwithstanding the fact that

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LANDLORD AND TENANT — Continued.
plaintiff thereafter revoked the permission given, continues in occupancy of the premises though ten days prior to the institution of the proceedings, notice to quit had been served upon him. *Held,* that a motion to dismiss the proceeding instituted under section 1411(4) of the Civil Practice Act, on the ground that the petition was jurisdictionally defective, will be granted and plaintiff remitted to an action of ejectment. Rosenweig v. Portnay, 136.

3. *Landlord's election to terminate tenancy for substantial structural change or rebuilding — Changes by subsequent lessee.*— A lease provided that it might be terminated on or at any time subsequent to January 1, 1921, by mailing to the tenant a six-months' notice of the landlord's election to terminate the lease, "such right, however, to be exercised by the lessor only in the event of its intended substantial structural change or rebuilding of said premises." *Held,* that a notice given on December 3, 1920, of the landlord's election to terminate the lease on June 4, 1921, was sufficient, and a final order dismissing a summary proceeding against the tenant as a holdover will be reversed and a new trial ordered. The fact that within a few days after the giving of the notice the premises were leased to a third party, which agreed with the landlord to make certain changes in the building, did not, as matter of law, deprive the landlord of his right to terminate the lease by the giving of the notice. Hudson & Manhattan R. Co. v. Mayers, 183.

4. *Housing laws — Reasonable rental of apartments — Tenant holding over — Defense of "unreasonable and unjust rent under oppressive agreements" — Laws of* 1920, *chap.* 944 — *Laws of* 1921, *chap.* 434.— Where a lease for not less than a year at a fixed rent expired on September 30, 1921, the tenant, though holding over without a renewal of his lease, is a tenant under chapter 944 of the Laws of 1920, and in a proceeding to dispossess him for non-payment of the rent for October, 1921, he is entitled to interpose the defense of "unreasonable and unjust rent under oppressive agreements." The statute (Laws of 1921, chap. 434) amending the housing laws has no application to such a tenant. Convent Holding Corporation v. White, 210.

5. *Summary proceedings — Rent — When prior adjudication as to rental value not binding upon parties in new proceeding.*—Where at the time of the trial of summary proceedings for non-payment of rent which the tenant pleaded was unjust, unreasonable, excessive and oppressive, there was no statute making a prior adjudication as to rental value binding upon the parties in a new proceeding brought for rent of the same premises for subsequent months, a final order awarding possession of the premises to the landlord entered upon a holding of the trial justice that a prior adjudication fixing the rental value of said premises was binding upon the parties in the absence of a change of conditions, and its refusal to accept evidence which the tenant sought to introduce, will be reversed and a new trial ordered. Foster v. Goldberg, 293.

6. *Summary proceedings — Holdover — Lease for store purposes only — Tenant removed, though residing there.*—A lease of premises to be used only for business purposes may not by judicial interpre-

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LANDLORD AND TENANT — Continued.
tation be converted into a lease for dwelling purposes. Where premises were leased to be used only for a grocery store, the landlord in summary proceedings against the tenant as a holdover is entitled to possession even though the tenant occupied the rear portion of the premises for dwelling purposes, and an order dismissing the proceedings will be reversed and a final order awarding the landlord possession of the premises will be granted. Kornbluth v. Braud, 298.

7. *Unjust rent — Contracts — Acceptance — Lease held to take effect upon delivery to tenant by mail — Rent laws apply.*— Upon the trial of an action for rent, pleaded by the tenant to be unjust and unreasonable, it was undisputed that in March, 1920, the landlord, a corporation, informed defendant that if he desired to remain on the premises after October 1, 1920, when his lease would expire, he must immediately enter into a lease for a new term. *Held,* that a lease for a term beginning October first and signed by the tenant at the office of the landlord's agents on the thirtieth of March, was in effect merely an offer on the part of the tenant which became effective as a contract only when accepted. An officer of the landlord signed the lease on March thirty-first and the letter in which it was mailed to defendant was delivered at his residence on April first and was received by him on his return from business at six-thirty of that evening. *Held,* that the lease took effect April 1, 1920, and the tenant being entitled to the protection of the rent laws enacted on that day, a denial of his motion to dismiss the complaint because of the landlord's failure to file a bill of particulars, was error for which the judgment entered in favor of plaintiff will be reversed and the complaint dismissed. 176 West 87th Street Corp. v. Fleischman, 316.

8. *Reasonable rent not an issue unless pleaded by tenant — Question of fact — Presumption referred to in chapter* 944, *Laws of* 1920, *available in summary proceedings — Rent greater than preceding year presents prima facie unreasonableness — Burden of of proof — Civ. Pr. Act,* § 1425.— In an action for rent based upon an agreement or in a summary proceeding the landlord need not establish that the rent sued for is reasonable; that is not an issue unless made so by the tenant's pleading, in which event a defense that the rent is unreasonable becomes, under the recent rent legislation, a question of fact. Under the general provision of section 1425 of the Civil Practice Act, to the effect that a defense or counterclaim may be set up and established in a summary proceeding "in like manner as though the claim for rent in such proceeding was the subject of an action," the presumption referred to in chapter 944 of the Laws of 1920, that if in an action for rent it appears that the rent sued for is greater than it was one year prior to the making of the agreement under which it is sought to be recovered, the agreement "shall be presumptively unjust, unreasonable and oppressive," is available in a summary proceeding, because it is one of the ways in which the tenant may establish his defense. While in an action for rent the defendant must plead his defense that the rent claimed is unreasonable, he makes out a *prima facie* case of unreasonableness when the evidence shows that the rent

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LANDLORD AND TENANT — Continued.
sued for is greater than it was a year before the agreement sued on was made. In the absence of other proof the presumption referred to in chapter 944 of the Laws of 1920 will support the defense of unreasonable rent; if, however, there is other proof tending to show that the rent sued for is reasonable, an issue of fact is created for the jury which must be instructed that the burden of proving that the rent is unreasonable is upon the defendant. Where the proof brings into operation the statutory presumption, the landlord, if he would overcome the effect thereof, must offer proof to show that the rent sued for is reasonable. It *seems*, that in an action for use and occupation the burden of proof as to what is a reasonable charge for rental is upon the landlord and this rule has not been changed by the recent rent legislation. Kornblum v. Schue, 325.

9. *Life estate — Acceptance of rent by remaindermen renders previous lessee a tenant at sufferance — Evidence — Notice that holding over after death of life tenant would be by the month only, held admissible.*—A life tenant of certain real property leased it for a term of two years from November 1, 1919, with privilege of renewal for three years. From and after the death of the lessor on November 23, 1920, the tenant continued to pay rent to the remaindermen. The grantee of the remaindermen under a deed of conveyance of the premises made June 2, 1921, as petitioner in summary proceedings, claimed that he permitted the tenant to remain as a monthly tenant and that the last term expired July 31, 1921. It was admitted that when petitioner signed the contract to purchase the premises he knew of the original lease. Upon holding that the acceptance by the remaindermen of the rent reserved in the original lease was a ratification and adoption thereof, and that the petitioner's acceptance of rent for several months was also a ratification of said lease, the trial justice dismissed the petition. *Held*, that the acceptance of rent by the remaindermen changed the status of the tenant, who would otherwise have been a trespasser, to a tenant at sufferance. Upon the death of the life tenant it was proper for petitioner to notify the tenant that its holding over would be by the month only, and the refusal of the court to receive in evidence the notice to that effect on the ground that it was a self-serving declaration, was error; the evidence should have been admitted as tending to prove a valid contract between the parties, and the final order dismissing the petition will be reversed and a new trial granted. Tunick v. Federal Food Stores, 329.

10. *Rent — Cities of the first class — Action for use and occupation against tenant holding over term — When tenant may attack increased rent as unjust — Tenancies from month to month — When thirty days' notice of termination necessary — In absence of such notice, rent formerly agreed upon only recoverable — Effect of prior adjudication of rental value — Tender — Bill of particulars must be filed before issue is joined — Laws of* 1882, *chap.* 303, *as amended by Laws of* 1889, *chap.* 357, *and Laws of* 1920, *chap.* 209 *— Laws of* 1920, *chaps.* 942, 944 *— Laws of* 1921, *chap.* 434, § 7.— Under the statute (Laws of 1920, chap. 944) which suspends the right of a landlord to regard a tenant holding over, either as a

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treaspasser or as a tenant for a renewal of the term at the same rent, and permits the tenant to remain in possession without the permission of the landlord, an action for use and occupation lies against the tenant holding over his term, in the absence of any new agreement. Even if a new agreement is made the rent reserved thereby may be attacked by the tenant as unjust and unreasonable on the first day that it accrues, in which case there is no necessity for the landlord to notify the tenant that after the expiration of his original term, use and occupation will be at the increased rate. In the case of tenancies from month to month or monthly tenancies, however, a different rule applies, because under the statute (Laws of 1920, chap. 209, amending chapter 303 of the Laws of 1882, as amended by chapter 357 of the Laws of 1889), which was clearly intended to prevent a tenant from being dispossessed unless he has received at least thirty days' notice of the termination of his existing agreement, which statute has not been repealed, such a tenant, in the absence of service of the notice to quit therein provided for, has the right to occupy the premises for another month at the same rent, and summary proceedings under chapter 942 of the Laws of 1920 must still be predicated upon this statutory notice to quit. The landlord, therefore, in an action brought against either a monthly tenant or a tenant from month to month for use and occupation or upon an implied agreement for an increased rental, must serve the tenant with a thirty days' notice stating that he elects to terminate the tenancy, and in the absence of such notice only the former monthly rent agreed upon may be recovered; any other course would nullify the provisions of chapter 209 of the Laws of 1920. The complaint in an action for use and occupation alleged that the defendant entered into possession of the premises for dwelling purposes under a written lease for two years and therein agreed to quit and surrender the premises at the expiration of the term, but that he failed so to do and continued in possession of the premises. The answer following a denial of the reasonable value as set forth in the complaint alleged as a defense that the action was for rent under an implied agreement for use and occupation and that the rent demanded was unjust and unreasonable, presumptively so pursuant to statute, and that the implied agreement under which a recovery was sought was unjust, unreasonable and oppressive, and it was further pleaded that without the consent of defendant the rent sought to be recovered had been increased about seventy per cent over the rent as it existed one year prior to the alleged implied agreement. *Held,* that defendant was not a trespasser but was simply in lawful possession of the premises and was liable to plaintiff for use and occupation and that the dismissal of the complaint was error. A defense of tender held not sustained, it appearing that plaintiff upon refusing to receive a check tendered by defendant, as rent, stated that he would consider accepting it as a tender of payment for the use and occupation of the premises. It was agreed that in a prior action commenced December 10, 1920, between the same parties to recover the rental value for the use and occupation of the premises for the thirty days succeeding the expiration of the term under the written lease the jury on January 5, 1921, rendered a verdict in an amount which was an increase of about ten per cent over the

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rent reserved in the pre-existing lease and that the judgment entered upon such verdict was paid and satisfied, and no appeal from the judgment taken. It was further agreed that at the commencement of the present action defendant had paid nothing for his occupancy from December 10, 1920, to May 5, 1921, except that, with his answer, he deposited in court a certain sum which was at the rate allowed by the verdict in the prior case. *Held,* that though there was no allegation in the complaint of any prior adjudication of any rental value of the premises as found by the jury in the prior case and no allegation of a change of conditions, the statement in plaintiff's bill of particulars that the taxes for 1921 exceeded those of 1920 in a certain amount met the requirements of the statute (Laws of 1921, chap. 434, § 7 and was a sufficient plea of the facts affecting the rental value of the premises, which arose since the period as to which the prior adjudication had been made. The main purpose of the bill of particulars required by the statute (Laws of 1920, chap. 944) is to fairly apprise the tenant of all the facts upon which the value of the premises should be predicated and in terms provides that issue shall not be joined until the filing of such a bill of particulars. Weed v. Carswell, 542.

11. *Cities of the first class — "Housing Laws" — Summary proceedings — When tenant may remain upon payment of reasonable rent — Tenant cannot be dispossessed from apartment, a portion of which is used for business, unless the business becomes objectionable or premises are not used for dwelling purposes — Laws of* 1920, *chap.* 942.— The recent "Housing Laws" created a new form of tenancy under which a tenant, without the permission of the landlord, is entitled to remain in possession of the premises occupied by him on October 1, 1920, upon payment of a reasonable rent, and neither expressly nor by necessary implication does the statute (Laws of 1920, chap. 942) permit the court to regulate or fix the extent of the occupancy or possession to which the tenant on that date was entitled, or to sever a room used for business purposes under the original hiring from the remainder of the premises occupied for dwelling purposes. A tenant, therefore, who for many year prior to October 1, 1920, occupied only a part of the leased premises for dwelling purposes, may not be dispossessed under chapter 942 of the Laws of 1920, unless the business conducted by him in the other part of the premises becomes objectionable or the case, by proof, is brought within one or more of the exceptions provided for in said statute. Morgenroth v. Emert, 570.

12. *New York city — Emergency rent laws — Date of delivery of lease governs — Case at issue when bill of particulars filed — Practice — Motion for jury trial — Right of tenant to bill of particulars and to jury trial when demanded in time.*— Whether a lease comes within the scope of the emergency laws depends upon the date of the delivery of the instrument. Where in an action for rent the answer pleads the statutory defense that the rent demanded is unjust and unreasonable the case is not deemed at issue until plaintiff has filed the statutory bill of particulars. The defendant in a Municipal Court action for rent by inadvertence neglected to demand a jury trial within three days after the service of the

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answer. By the service of an amended answer the date of the joinder of issue was changed. A motion to compel plaintiff to file and serve the statutory bill of particulars was denied on the theory that it was not required. After unsuccessful efforts on the part of defendant to obtain a jury trial judgment was rendered as the result of a trial by the court alone. Upon reversing the judgment and ordering a new trial, *held*, that defendant's demand for a jury trial was timely and his motion to direct the filing of the bill of particulars will be granted. Guide Realty Co. v. Bloom, 687.

See **Evidence**; **Injunctions**; **Municipal Court of the City of New York.**

LARCENY.
See **Savings Banks.**

LEGACIES.
See **Transfer Tax**; **Wills.**

LIBEL.
Publication of newspaper articles indicating plaintiff's disinclination to work — Ridicule — Defendant's motion for judgment on pleadings denied.— Where the publication in a daily newspaper of two articles written of and concerning the plaintiff, the Prince d'Aragon, an ancient, noble and honorable family of Spain, indicating a disinclination on his part to avail himself of the opportunity to work which had been provided for him, may have tended to subject him to public ridicule and scorn, defendant's motion for judgment on the pleadings on the ground that neither of the articles is libelous *per se* and that in the absence of an allegation of special damage the complaint is fatally defective, will be denied. Pignatelli v. New York Tribune, Inc., 466.

LIEN LAW.
Section 184 — *Conditional bill of sale given to secure purchase price of taxicab — Lien for repairs superior to property rights of conditional owner.*— Section 184 of the Lien Law does not contravene the due process of law provision of the State and Federal Constitutions. One of the defendants, as security for the payment of the purchase price of a taxicab sold to him by the plaintiff, executed and delivered to it a conditional bill of sale which was duly filed according to law. Subsequently said defendant sold his right and interest in the taxicab to M., the other individual defendant. Three months after all of the purchase price had been paid, with the exception of $19, M. brought the taxicab to the place of business of the corporate defendant, and in writing authorized it to do some repairs and furnish new parts and agreed to pay therefor $500. Additional work was subsequently ordered by M., the cost of which was $75. In an action brought by the original vendor to recover possession of the car, which it had replevied from the corporate defendant, *held*, that irrespective of section 184 of the Lien Law said defendant was entitled to a lien for $575, which was superior to the property rights of plaintiff. Terminal & Town Taxi Corp. v. O'Rourke, 761.

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LIFE ESTATE.

Effect of acceptance of rent by remainderman. Tunich v. Federal Food Stores, 329.

See **Transfer Taxes.**

LOST INSTRUMENT.

See **Surrogates' Courts.**

MANDAMUS.

Town board — Demurrer to alternative writ — Payment to contractor for construction of sewer — Parties — When surety not necessary party.— Where a town board, after raising the money to pay for the construction of a sewer extension, duly ordered, fails as in duty bound to pay the money over to the sewer commissioners, it may be compelled by mandamus to perform that duty. Where it is made to appear that the relator substantially performed the contract until under a clause thereof the work was taken over by the sewer commissioners; that there is due to him a certain sum upon the contract, a part of which has been assigned to the other relator, that of the amount raised by the issue of town bonds for the sewer construction there remains, after expenditures, a balance of more than sufficient to pay the claims of both relators, demand therefor having been made, a demurrer interposed by the sewer commissioners and also by the town board to an alternative writ of mandamus will be overruled. The surety on the contractor's bond was not a necessary party to the proceeding if, as alleged, the contractor had substantially performed the contract, and money was due and owing to him thereunder. Relators' cause of action being for money due under the contract and it requiring successive steps by both boards to raise the money, both of which steps having but one result, that is, payment of moneys claimed to be justly due relators, it was proper to join both boards in one proceeding and compel action therein by both. Whether the defendants, for lack of sufficient funds on hand to meet the relators' claim, may be compelled to take steps under the statute to raise the money for that purpose, it is not necessary now to determine. People ex rel. Desiderio v. Conolly, 77.

MANDAMUS.

See **Civil Service.**

MARITIME LAW.

Actions by seamen for injuries — Act of congress approved June 5, 1920 — "The court of the district" means a federal court — Seaman may not reject statutory provision as to jurisdiction of court if he accepts benefits of statute — Dismissal of complaint in state court.— The words "the court of the district" in the act of congress, approved June 5, 1920, which practically has modified certain principles of the maritime law theretofore applicable to actions by seamen for maritime torts and injuries, are apt to designate a district court of the United States but are insufficiently descriptive to be regarded as referring to state courts. While said act of congress provides that a seaman who has suffered personal injury in the course of his employment may bring an action for

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MARITIME LAW— Continued.
damages and that in such action all federal statutes modifying or extending the common law remedy in cases of personal injury to railway employees, shall apply, a seaman may not accept the benefits of said act of congress and reject the accompanying provision that jurisdiction in such an action shall be under the court of the district in which the defendant's employer resides or in which his principal office is located. Where, therefore, such an action was brought in the Supreme Court of this state against the United States Shipping Board Emergency Fleet Corporation, a motion to dismiss the complaint on the ground that the court has not jurisdiction of the subject matter, will be granted. Prieto v. United States, etc., Corp., 703.

MARRIAGE.
Annulment for fraud — Broken promise to have Jewish ceremonial marriage.— Where a husband absolutely refuses to have a Jewish ceremonial marriage performed in fulfillment of his promise made to his wife before the civil marriage, and the referee to hear and determine the issues in an action for the annulment of the marriage on the ground of fraud finds that because of such refusal there has been no cohabitation between the parties, the report of the referee in favor of plaintiff will be confirmed. Rosza v. Rosza, 728.

MILK.
See **Injunction; Warranty.**

MONEY HAD AND RECEIVED.
Payment by mistake.
See **Banks and Banking.**

MORTGAGES.
1. *Insurance — Covenant by mortgagor to keep premises insured for benefit of mortgagee is personal and does not run with the land — Purchaser of real property not assuming payment of outstanding mortgage not bound by covenant in mortgage to insure — Statutory short form of mortgages held not to unsettle the accepted rule of covenants — Real Prop. Law,* § 254(4).— A covenant by a mortgagor to keep the premises insured for the benefit of the mortgagee is entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage. A real estate mortgage for $28,000 contained a clause to the effect that the mortgagor would keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee and that the receipt of any such insurance money might be retained and applied by the mortgagee toward the payment of the mortgage debt or might be paid over either wholly or in part to the mortgagor, her executors, administrators, successors or assigns, to enable her to repair the buildings or erect new ones in their place, or for any other purpose or object satisfactory to the mortgagee, without affecting the lien of the mortgage for the full amount secured thereby before such damage by fire or such payment over took place. After the assignment of the mortgage to plaintiff she conveyed the premises subject to mortgages aggregating $38,125, with accrued interest, and subject also to certain taxes

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MORTGAGES — Continued.
and water rents. The grantee conveyed the premises "subject to existing encumbrances" to the defendant company, which was the owner of the premises until the sale thereof under a judgment entered in an action to foreclose the $28,000 mortgage, which sale resulted in the entry of a deficiency judgment of $6,000 in favor of the plaintiff, who was the purchaser at the sale, against the mortgagor who has since relieved herself of liability therefor through the intervention of bankruptcy proceedings. At all times during defendant's ownership of the premises it paid the premiums on three certain policies of fire insurance, each for three years, and permitting other insurance without notice until required, obtained for and delivered to it by W. who at all such times was its agent. Two of said policies, each for $10,000, loss if any payable to the mortgagee as interest may appear, and containing pro-rating clauses with other insurance on the premises, were delivered by defendant to the attorneys for plaintiff herein, at or about their date of issue. The third policy for $7,500 for three years contained no mortgage clause, the loss if any was not in terms made payable to the mortgagee, and the defendant company retained it. When all this insurance was effected and at all times down to and at the time when the buildings were destroyed by fire, the cash value thereof was $27,500. The total amount received by plaintiff upon the two policies delivered to her through her attorneys was $13,190.90, which payment and an assignment of a share in the bond and mortgage were made without the knowledge or consent of the defendant company or of W. In an action to impress a lien in favor of plaintiff upon the sum of $4,363.63 claimed to have been collected by W. on the $7,500 policy and turned over by him to the defendant company, *held*, that the defendant company not having assumed the payment of the mortgage and not having covenanted with either the mortgagee or plaintiff to keep the premises insured for their benefit, the rule that where a mortgagor has covenanted to take out insurance for the benefit of the mortgagee and then takes out insurance in his own name, the same will be impressed with an equitable lien in favor of the mortgagee in case of loss, did not apply. Although the defendant company was not bound to insure, upon its failure so to do plaintiff might procure such insurance from year to year, adding premiums to the mortgage debt. The stipulation as to the facts containing no admission on the part of either of the defendants, the executors of W. having been substituted as defendants in his place and stead, of any obligation by the defendant company to insure for the benefit of the mortgagee, the inference was not justified that the defendant company assumed the obligation to carry out the terms of the mortgage. In effecting the insurance, paying the premiums and delivering the two policies to plaintiff's attorneys, the defendant company complied with the insurance clause of the mortgage, but such compliance did not, in the circumstances, create a personal obligation to insure. The statutory short form of mortgages (Real Prop. Law, § 254(3), as amended by chap 682 of the Laws of 1917) now section 254(4) of the Real Property Law, the clear purport of which is to protect a mortgagee in every way possible, was not intended to overturn and unsettle a rule of covenants accepted in New York since 1882 and reaffirmed in *Reid* v. *McCrum*, 91 N. Y.

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MORTGAGES — Continued.
412, and upon the authority of that decision it was not the duty of the defendant company, under the mortgage, to take out insurance for the benefit of plaintiff, and the policy for $7,500 issued in favor of defendant did not inure to the benefit of plaintiff as the holder of the mortgage in question. Judgment directed in favor of all the defendants, upon the merits. Neilson v. Ella Realty Co., Inc., 213.

2. *Satisfaction of — Cities of the first class — Lost document — Legal services — Where neither the original mortgage nor order dispensing with its production is presented, owner may recover from holder of mortgage value of attorney's services in procuring order — Real Property Law,* § 322.— The owner of mortgaged premises, upon payment to the attorney of the assignee of the mortgage of the balance due thereon, demanded a satisfaction piece and the original bond and mortgage which upon the assignment thereof had not been delivered to the assignee but were thereafter accidentally destroyed. The attorney for the assignee accepted the payment and gave a receipt which *inter alia* stated that the original papers and satisfaction piece duly executed were to be procured from the assignee and delivered to the mortgagor. The mortgagee, though he did execute a satisfaction piece and delivered it to the attorney of the owner of the premises, failed to obtain an order dispensing with the production of the original mortgage, so that it might be discharged of record. *Held,* that the case being one in which section 322 of the Real Property Law applied, the owner of the premises was entitled to recover of the assignee of the mortgage the agreed value of an attorney's services in procuring such an order and a judgment for that amount will be affirmed. Wellbrock v. Haas, 334.

3. *Foreclosure — Equity — Election to demand principal not enforced, if unconscionable — Certain minor repairs held not to violate covenant that alterations without consent of mortgagee permitted whole amount to become due — City of New York — Tenement House Law,* §§ 121, 122, *not applicable.*— Equity will not permit a party to avail himself of a legal right for the purposes of injustice or oppression. While an action to foreclose a mortgage is equitable in its nature an election to demand payment of the principal sum, if unconscionable, will not be enforced. A purchase money mortgage contained a covenant that should any alterations in the building on the premises be made without the consent of the mortgagee, then at his option the whole amount of the principal sum should immediately become due and payable. Without the consent of the mortgagee the mortgagors, in order to dry up and prevent the flooding of the cellar, cut a door in the foundation wall and also erected wooden partitions in the basement, removed two foundation piers which were unsafe, and substituted others therefor, and cut a window in the rear of the apartment on the first floor in order to afford safe access to the yard by means of an open porch. In an action to foreclose the mortgage for an alleged violation of said covenant, it appeared to the satisfaction of the court that the defendants, in making such alterations, had no idea that they were violating the provisions of the mortgage. It further

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MORTGAGES — Continued.
appeared that all the work, which plaintiff knew was going on and made no objection thereto until he served notice of his election to call in the mortgage, was necessary and proper in order to preserve the building and the proper and convenient use thereof. Plaintiff made no claim that he had been injured by the alterations or that his security had been impaired in the slightest degree, and the evidence showed that the alterations had enhanced the value of the property. *Held,* that in the circumstances the election of plaintiff to demand payment of the mortgage debt was manifestly unconscionable and that defendants were entitled to judgment dismissing the complaint upon the merits, with costs but no extra allowance. It appearing that the mortgage had still over five years to run, with interest at four and one-half per cent, and that if the relief sought was granted plaintiff would be enabled to collect the mortgage debt far in advance of maturity and loan the money out at a higher rate of interest, his contention that it was not important whether the security of his mortgage was impaired or not, was untenable. A further contention by plaintiff that even if the mortgage did not contain the covenant in suit he had, under sections 121 and 122 of the Tenement House Law, a right to call in the mortgage upon his discovery that the alterations were being made without an application for a permit having been filed, was also untenable, as the case did not fall within the provisions of the statute relied upon, but even so, the effect of the failure to file plans and specifications before making the alterations was avoided by the subsequent approval thereof by the proper authorities, and the issuance of the appropriate permits. Loughery v. Catalano, 393.

MOTIONS AND ORDERS.

1. *Renewal of motion to vacate default judgment limited to one year from date of entry of judgment — New York City Municipal Court Code,* §§ 119(2), 129.— The right given by section 119(2) of the Municipal Court Code to renew a motion to vacate a default judgment is, by section 129 of said Code, limited to the period of one year from the date of the entry of judgment. Where a motion to open a default judgment, made within a year after the date of its entry, was never decided, a motion to renew the undecided motion, made after the expiration of said year, does not vest the Municipal Court with jurisdiction to open the default and set aside the judgment. Giovini v. Arlucke, 100.

2. *Partial judgment — Admission in answer of part of amount due — Rules of Civil Practice, rules* 113, 114.— The words "such defense" in rule 114 of the Rules of Civil Practice plainly have reference to the defense specified in the preceding rule 113, and when the two rules are read together, as they must be, the remedy afforded by rule 114 can be granted only in a case in which a summary judgment may be entered under rule 113. Where in an action to recover money alleged to be due under contracts of employment the answer admits that a certain sum, a part of the entire claim, was found to be due plaintiff at the date of an accounting between the parties of the transactions constituting the subject matter of the action, a motion under rule 114 of the Rules of Civil Practice for final judgment for the part so admitted to be due, will be granted,

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even assuming that every allegation in separate defenses be proven to be true. Appelbaum v. Gross, 140.

3. *Summary judgment — Promissory note — Transferee not holder in due course without indorsement by payee — Motion for summary judgment denied where complaint and affidavit failed to state the full facts — Rules of Civil Practice, rule* 113 *— Negotiable Instruments Law,* § 79.— Under section 79 of the Negotiable Instruments Law the transferee of commercial paper cannot be a holder thereof in due course until it has been indorsed by the payee. The complaint in an action against the makers of a promissory note did not allege who was the payee of the note or that it was transferred by his indorsement, nor was it alleged that plaintiff took the note in good faith and for value, or that at the time it was negotiated, plaintiff had no notice of any infirmity in the paper or defect in the title of the one negotiating it. The answer, following a denial of certain material allegations of the complaint, alleged that plaintiff, at the request of one D. and for value received, discounted the note in the usual course of business and thereupon became and still was the owner and holder thereof. *Held,* that though upon a motion for summary judgment under rule 113 of the Rules of Civil Practice the plaintiff submitted an affidavit stating that the note, prior to maturity, was taken and received in the ordinary and usual course of business and that plaintiff was the owner and holder thereof in due course, the motion will be denied where the defendants also file an affidavit stating facts sufficient to entitle them to defend the action, and neither the note nor a copy thereof is presented on the motion. Farmers National Bank v. Williams, 567.

4. *Setting aside verdict — Where there is sufficient evidence to justify verdict, setting aside improper — Sale according to sample — Change in order for goods.*— Where a verdict is clearly the result of passion, prejudice or corruption, the discretionary power of the court to set it aside is not intended to establish the proposition that a verdict shall not be permitted to stand unless it is in harmony with the views of the trial justice. Where, though the testimony on material points is conflicting, there is sufficient evidence to justify the finding of the jury, the granting of a motion to set aside the verdict is an improper exercise of judicial discretion. In an action to recover the purchase price of calicos alleged to have been sold in accordance with samples, one containing red lines, another blue lines and the other dark blue or black lines, the defendant contended that the contract was for goods containing red and blue lines and dark blue lines, and that contrary to the agreement the plaintiff furnished calicos with black lines, for which reason the goods were rejected. *Held,* than an order setting aside a verdict in favor of plaintiff on the ground that his testimony with respect to the change made in the order for the goods was not only false but a deliberate attempt to insert therein certain words to justify the delivery of goods not called for by the defendant, will be reversed with costs to appellant and the verdict reinstated. Orinstein v. Jaffee, 582.

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MUNICIPAL CORPORATIONS.

City of New York — Injunction — Commissioner of licenses has power to revoke theatre license.— The commissioner of licenses of the city of New York has legal power to revoke a theatre license, and a motion for an injunction *pendente lite* in an action to restrain the exercise of such power will be denied. Woods Theatre Co., Inc., v. Gilchrist, 605.

See **Street Railways.**

MUNICIPAL COURT OF THE CITY OF NEW YORK.

1. *Practice — Landlord and tenant — Increase of rent — Where after a trial before a justice without a jury the judgment is set aside, the parties are restored to their status as of time of joinder of issue — Refusal of jury trial upon second trial reversible error — Municipal Court Code,* § 118.— In an action brought to secure an increase in rent the respective defendants, upon pleading, duly demanded a jury trial pursuant to section 118 of the Municipal Court Code. The cause, after being placed upon the general calendar as required by section 95 of said Code, was submitted to one of the justices, who made a decision increasing the rent of several of the defendants fifteen per cent. The judgments entered upon such decision were set aside on motion, upon the ground that defendants' attorney had exceeded his authority in waiving a trial by jury, and the justice, upon conditions not pertinent here, permitted the submission to be withdrawn and remanded the case to the general calendar. *Held,* that by such decision the parties were restored to their original status as of the time of the joinder of issue. The cases coming on for trial before another justice, he stated that he would not allow a jury trial and the defendants, having taken an exception to such ruling, declined to proceed without a jury and inquests were taken whereby the rentals of defendants were increased on an average of forty per cent. *Held,* that the situation as presented to the second justice was as if no other trial had been had; the decision of the court that a jury trial could not be had was erroneous, and an order entered upon denying defendants' motion to open the defaults and to vacate the judgments entered thereon will be reversed, the motion granted, the judgments vacated and new trials ordered. Schwartz & Weisner H. Corp. v. Fernald, 575.

2. *Provisions of Civil Practice Act applicable — Deposition of party before trial — Civ. Pr. Act,* §§ 290, 291.— The Municipal Court of the city of New York is a court of record and the provisions of the Civil Practice Act for the taking of testimony by deposition and the practice thereon as described by said Act, are applicable to said court. Where in an action brought upon oral pleadings in that court to recover broker's commissions, the answer seeks to put in issue every fact necessary for plaintiff to prove in order to establish a cause of action, a motion under section 291 of the Civil Practice Act to vacate a notice given by plaintiff for the taking of the deposition of defendant before trial pursuant to section 290 of said statute will be denied, although plaintiff has filed a bill of particulars. Crowe v. Marsh Garage Co., Inc., 660.

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MUNICIPAL COURT OF THE CITY OF NEW YORK — Cont'd.

3. *Calendar practice — Failure to give notice of order transferring cause to day calendar as required by rule* 33 *of said court — Motion to vacate voidable judgment under section* 6(7) *of the Municipal Court Code — Third party order in supplementary proceedings based on said judgment reversed — Municipal Court Code,* § 129(2) *does not apply.*— After a case in the Municipal Court of the city of New York had been placed on the "reserved generally" calendar, a motion by plaintiff to restore it to the trial calendar was granted by an indorsement of the justice on the motion papers, but no formal order was entered and no notice of the so-called order was served on defendant's attorney. Thereafter, without defendant's knowledge, judgment was entered against him upon an inquest, and more than a year later a transcript of said judgment was filed in the office of the county clerk. A motion by defendant to set aside and vacate the judgment as void was denied, on the ground that, under section 129(2) of the Municipal Court Code, it was made too late. After a motion by defendant for a stay had been denied for want of power, plaintiff obtained a third party order for the examination in supplementary proceedings of a bank. Upon reversing an order granting defendant's motion, made on an order to show cause why the third party order should not be vacated, *held,* that the case was improperly on the calendar of the Municipal Court. Defendant not having been served with notice of the entry of the order or direction of the justice transferring the cause from the "reserved generally" calendar to the "day calendar" as required by rule 33 of the Municipal Court, the court should not have permitted the inquest or entered judgment as upon a default. The failure of plaintiff to submit proof of compliance with said rule 33 made the judgment entered voidable, and defendant's motion to vacate it should have been granted under section 6(7) of the Municipal Court Code. Section 129(2) of the Municipal Court Code, which relates only to the opening of defaults, did not apply, and the court below has ample power to grant a reargument of the motion to vacate the judgment or defendant, upon new papers showing what has transpired since the entry of said judgment, may renew the motion to vacate it. Stoneware El. Stove Works v. Barrett, 699.

4. *Rules of Civil Practice apply — Action for rent — Insufficient denial under Municipal Court Code,* § 92 — *Answer alleged lease procured by fraud — Tenant did not surrender possession of premises — Motion for summary judgment under rule* 113 *of Civil Practice Rules granted — Municipal Court, Code,* § 15.— By section 15 of the Municipal Court Code the Rules of Civil Practice apply to the Municipal Court of the city of New York and no provision of the Judiciary Law is inconsistent with such application. In an action brought in the Municipal Court of the city of New York to recover rent for the last three months of 1921 under a written lease executed in November, 1920, the defendant both in his original and in his amended answer denied "each and every allegation of the complaint excepting that he admits he is in possession of the premises described in the complaint." *Held,* that under section 92 of the Municipal Court Code such denial was insufficient to raise the question of the validity of the lease, particularly where in a separate defense the defendant expressly admits that he executed

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MUNICIPAL COURT OF THE CITY OF NEW YORK — Cont'd. the lease, entered into the occupation and possession of the premises and paid rent from December 1, 1920, to November 1, 1921. Alleged false and fraudulent representations by plaintiff that no building or structure would be built upon the vacant lot in the rear of the leased premises during the period of defendant's lease, were pleaded in a separate defense and following a statement that said representations were relied upon by defendant, it was further alleged that after the making of the lease a structure, the new addition to the Plaza Hotel, etc., was built upon said vacant lot, the wall of which projected far above the windows in defendant's apartment and so near as to cut off light and air and shut off the view. *Held*, that if defendant because of the alleged false and fraudulent representation desired to repudiate or rescind the lease he should have, on discovery of the alleged fraud, promptly surrendered possession of the premises. Upon a motion made by plaintiff after the Civil Practice Act and the Rules of Civil Practice took effect, to strike out the answer and for summary judgment under rule 113 of said rules, the defendant in his supporting affidavit gave his version of a conversation with an employee of plaintiffs' agent concerning the terms of the lease and as to the possibility of a building being erected in the rear of the leased premises. *Held*, that the motion for summary judgment must prevail, it being apparent from the undisputed facts that upon no theory of law could the defendant sustain his alleged defense. Cochran v. Scherer, 765.

For sections of Code see *ante*, p. xlix.

NAME.

Unfair use of corporate. Brooklyn Hebrew Home, etc., v. Jewish Home, 347.

NATURALIZATION.

Service in Coast Guard, subsequent to retransfer from navy to treasury department, does not comply with act of Congress of July 19, 1919, permitting application without filing declaration of intention.— Where it appears that petitioner on September 22, 1921, after completing a term of exactly one year in the service of the United States Coast Guard which was by direction of the president, pursuant to the act of Congress approved June 28, 1915, transferred from the treasury department to the navy department until August 28, 1919, when it was again placed under the control and direction of the secretary of the treasury and has been ever since, the petitioner does not come within the act of Congress approved July 19, 1919, which provides that any one of foreign birth who served in the military or naval forces of the United States during the World War shall be entitled to apply for citizenship without filing a declaration of intention, etc., and such an application on his behalf will be denied. Matter of Thorsen, 556.

NAVIGABLE WATERS.

Right of state to improve.

See **Claims Against State; Water and Water Courses.**

NEGLIGENCE.

Wife cannot sue husband to recover damages for personal injuries. — In the absence of statute a wife cannot sue her husband to

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NEGLIGENCE — Continued.
recover damages for personal injuries alleged to have been sustained through his negligence. Where in an action for damages based upon the negligence of the plaintiff's husband the complaint alleges that a collision between a trolley car of the impleaded defendant and an automobile owned and driven by plaintiff's husband, occurred by reason of his negligence and that of the motorman of the trolley car, a motion for judgment on the pleadings and for a dismissal of the complaint as against the husband will be granted, but without costs. Perlman v. Brooklyn City R. Co., 353.

See **Bill of Particulars**; **Evidence.**

NEGOTIABLE INSTRUMENTS.
See **Bills and Notes**; **Motions**; **Pleading.**

NEW TRIAL.
See **Criminal Procedure.**

NEW YORK CITY.
Traffic regulations.— Article 5 of the traffic regulations of the city of New York provides: "* * * Section 2. A vehicle's driver when about to turn either from a standstill or while in motion, shall give timely signal by hand or whip or in some other unmistakable manner to indicate the direction of the turn. * * * Section 4. Police Whistle signals shall indicate: One blast — N. and S. traffic stops and E. and W. proceeds. Two blasts — E. and W. traffic stops and N. and S. proceeds. Three or more blasts — The approach of fire apparatus or other danger. * * *." Defendant was proceeding north with his vehicle and upon one blast of the traffic officer's whistle did not stop but turned into a cross street and proceeded east, contending that the signal was to stop north and south traffic and not to prohibit a driver going north from joining in the east and west traffic. *Held*, that upon one blast of the traffic officer's whistle north and south traffic must stop at foot crossings of the street and not proceed until the officer has signaled that such traffic may continue. One desiring to turn into cross street should convey his intention to do so to officer before proceeding. People v. Loring, 495.

See **Civil Service**; **Municipal Corporations.**

NUISANCE.
See **Highways.**

ORDINANCES.
See **Constitutional Law**; **Code of, City of New York**, see *ante*, p. 1.

PARENT AND CHILD.
Liability of parent for necessaries — Separation agreement not a defense to recovery for medical attendance to infant child — Penal Law, § 482(1).— Both at common law and under section 482(1) of the Penal Law a father is liable for necessaries furnished to his infant child. In case the parent neglects his duty in that regard any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law implies a promise on his part to pay. A separation agreement

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PARENT AND CHILD — Continued.
binds only the parties thereto, and is not a defense to an action brought against the husband to recover the reasonable value of necessary medical attendance rendered to his infant child, though the plaintiff was aware that defendant and his wife were living separately and apart under agreement, and a judgment dismissing the complaint upon the merits will be reversed, and judgment ordered in favor of the plaintiff for the full amount claimed, with costs. Von Roeder v. Miller, 106.

See **Trusts; Wills.**

PAROLE COMMISSION ACT.
See **Criminal Law.**

PARTIES.
See **Mandamus.**

PARTNERSHIP.
See **Receiver.**

PENAL LAW.
See *ante,* p. **xlix.**

PLACE OF TRIAL.
See **Venue.**

PLEADING.
Action on promissory note — Denial of knowledge or information sufficient to form belief as to assignment to plaintiff good under Civil Practice Act, § 261 — *Affirmative defense that defendant doing business in New York without certificate required by General Corporation Law,* § 15 — *Court no power to strike out answer and grant summary judgment — Rules of Civil Practice,* 105, 113. — Rule 113 of the Rules of Civil Practice was intended to prevent a defendant in commercial cases from interposing an answer which would unnecessarily delay the entry of a judgment to which the plaintiff was entitled. In certain cases the defendant, under said rule, may be compelled to state his version of the matter in litigation, but where he shows an absence of knowledge or information in regard to any material allegation of the complaint he cannot be compelled to accept the plaintiff's version, and in such circumstances the court cannot strike out the answer. In an action upon a promissory note, the answer, besides a denial that the note was made and delivered in the city of Chicago, as alleged in the complaint, denied any knowledge or information sufficient to form a belief as to the allegations of the complaint concerning the assignment of the note to plaintiff. The answer also set up as an affirmative defense that the note was made and delivered in the city of New York; that the payee is doing business there and has not obtained any certificate of authority as required by section 15 of the General Corporation Law. The plaintiff upon a motion for summary judgment pursuant to rule 113 of the Rules of Civil Practice and for such other and further relief as the court might deem just, presented affidavits showing that the note was assigned to him by written instrument and further, that the note was sent to the office of the payee in Chicago, inclosed in a letter from the defend-

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PLEADING — Continued.
ant requesting the payee to accept the note in renewal of a note previously given, and that the payee thereupon wrote to defendant that it would accept the note. While the defendant presented no proof in contravention of the allegations of the moving papers, it did appear that on the examination before trial of one of defendant's officers, he admitted that according to his best recollection the note was made and delivered in the manner claimed by plaintiff. *Held*, that upon the undisputed facts the note was made and delivered in the city of Chicago, but there being no claim that defendant has any knowledge or information other than that derived from the allegations of the complaint and the moving affidavits, as to the assignment of the note to plaintiff, the defendant in the circumstances was permitted by section 261 of the Civil Practice Act to deny knowledge or information sufficient to form a belief as to these allegations, and thereby raise an issue, and as matter of law was entitled to defend; the court, therefore, was without power to strike out the answer and grant a summary judgment. The motion not having been made within twenty days after the service of the answer, as required by rule 105 of the Rules of Civil Practice, the question whether under any other rule the court could strike out the affirmative defense alone may not be considered. Rogan v. Consolidated Coppermines Co., 718.

PRACTICE.
See **Motions and Orders; Surrogates' Courts; Civil Practice Act and Rules**, see *ante*, p. xlix *et seq.*

PRINCIPAL AND AGENT.
Undisclosed principal — Election — Res adjudicata — Mere commencement of action against principal held not to discharge agent, but amount paid by principal must be credited.— While the commencement of an action against a disclosed principal on a contract made with its agent is some evidence of an election to hold the principal only, it is not conclusive to exonerate the agent. The trial of an action for lumber sold and delivered, in which the main contention was as to whether in the transaction defendant acted only as agent for a building corporation, resulted in a judgment against defendant. Subsequently the plaintiff brought an action upon the same cause of action against the corporation but upon payment of a certain sum said action was settled and discontinued, and the plaintiff executed a general release of all claims against the corporation. After defendant's motion for a new trial, on the ground of newly discovered evidence, had been granted, he was permitted to amend his answer so as to plead, as separate defenses, payment, accord and satisfaction and *res adjudicata*. Upon the new trial it appeared that not until after the first trial did plaintiff know that the corporation was the principal, and the court found as a fact that at the time of the purchase of the lumber defendant was not acting as agent. *Held*, on appeal from the judgment rendered in favor of plaintiff for the full amount claimed, that the judgment should be modified by reducing the same in the sum received by plaintiff upon the settlement of his action against the corporation, and as so modified, affirmed. Clarry Lumber Co., Inc., v. O'Brien, 319.

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PROCESS.

Jurisdiction — When omission of certain words in summons not a jurisdictional defect — Civil Practice Act, § 105 — *Rules of Civil Practice, rule* 45.— Under the liberal provisions of section 105 of the Civil Practice Act, the defect in a summons, which does not follow the form prescribed by rule 45 of the Rules of Civil Practice, is not jurisdictional. Where with a summons omitting the words "or, if the complaint is not served with the summons, to serve a notice of appearance," a complaint was actually served, such omission is not prejudicial and a motion by defendant, appearing specially, for judgment dismissing the complaint on the ground that the court had not jurisdiction over the person of the defendant, will be denied. A party may not in the same motion challenge the jurisdiction of the court over his person and also ask for judgment on the pleadings because of the insufficiency of the complaint. The power of the court to relieve against default extends only to default suffered in judicial proceedings before the court. Siccardi v. Ajello, 118.

See **Infants.**

PROVISIONAL REMEDIES.

Arrest — Motion to vacate order — Additional affidavits permitted — Civil Practice Act, §§ 822, 1569, 1573.— Under the Civil Practice Act additional affidavits in support of an order of arrest may be received upon a motion to vacate the order. Whatever the application of section 1573 of the Civil Practice Act, so far as a motion made before that statute took effect, to vacate an order of arrest theretofore granted, is concerned, a reading of section 1569 of the same act is necessary and under section 822 thereof, which must also be read but is not limited to supplying defects, the plaintiff may be permitted to submit additional affidavits in support of the order of arrest. Auditore v. Caulauzaro, 253.

PUBLIC SERVICE COMMISSION.

See **Street Railways.**

REAL PROPERTY.

See **Easements; Vendor and Purchaser.**

RECEIVER.

Commissions and counsel fees — Partnership — Commissions on delivery of valuable horse by receiver to plaintiff fixed at reasonable amount to be paid by defendant.— Under a contract by which plaintiff and defendant became partners or joint adventurers in a stallion defendant was to keep the horse in California until the end of the season of 1920 and plaintiff was to keep him in Kentucky for the seasons of 1921 and 1922, after which time arrangements satisfactory to both parties were to be made. At the end of the season of 1920 defendant refused to deliver the horse as agreed. Thereafter in an action for the dissolution of the partnership, an order granting mandatory injunction directing the delivery of the stallion to plaintiff was affirmed on appeal, and the receiver appointed to carry out the order did so without litigation or ancillary receivership in California and delivered the horse to plaintiff

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RECEIVER — Continued.
on May 23, 1921, in good condition. *Held*, upon motion to fix the compensation of the receiver, etc., that plaintiff was entitled to be reimbursed for the taxable expenses caused by defendant's unwarranted acts, and though the dissolution action was undisposed of, the services of the receiver, admittedly worth $5,000, and those of his counsel, proven to be worth $500, should be paid by defendant, and it is so ordered. Madden v. Rossiter, 244.

REFERENCE.
To superintend discovery and inspection of books.
See **Corporations.**

REFORMATION OF INSTRUMENTS.
See **Sales; Vendor and Purchaser.**

RES ADJUDICATA.
See **Principal and Agent.**

RESIDENCE.
See **Transfer Tax.**

RIPARIAN OWNERS.
See **Injunction.**

SALES.
1. *Contracts "c. i. f." — Construction of — Reformation of contracts for sale of sugar shipped by steamer — Demurrer — Equity — "Landed weights" diminished by loss or damage due to risk of voyage.* — In an action for the reformation of a contract in writing which provided for the sale of "about 2,000 tons Philippine Is. Dry Sugar, May, June, July shipment by str. or steamers for New York, * * * landed weights, tare 2 per cent., cost insurance and freight. Payment by buyers opening confirmed New York credit for approximate amount of invoice at 90 days sight, against which sellers to draw for not exceeding 90 per cent. of invoice amount; full shipping documents, including policy of insurance for invoice value plus 10 per cent. attached to draft. Payment for balance of invoice to be made in New York after completion of delivery and settlement of outturn weights and tests. * * * Delivery to be tendered ex vessel at a customary safe wharf or refinery in port of New York as directed by buyer. Damaged, if any, to be taken at a fair allowance. * * * In event of total loss buyers to collect insurance and effect settlement with sellers for the full amount of invoice," the complaint alleged that the writing did not represent the real contract, but that the words "damaged, if any, to be taken at a fair allowance" were inserted through inadvertence and mutual mistake. It was further alleged that plaintiff presented full shipping documents covering the 2,000 tons of sugar and a policy of insurance with draft attached and had received payment in a certain sum. The full value of the sugar shipped, at the agreed price, including, however, the sugar lost in transit by the stranding of the vessel amounted to a larger

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sum than that received by plaintiff who asked judgment for the difference. *Held,* upon overruling a demurrer with leave to serve an answer, that if the contract was reformed as prayed for it would be susceptible of the reasonable construction that though the seller was required to deliver goods at a customary wharf in New York and the price could not be finally determined until the goods were landed, yet that the property in the goods and the risk of loss was intended to pass when the full shipping documents were presented, including an insurance policy. In case the goods were totally lost then by the express terms of the contract the buyers were to pay the full amount of invoice, and if the goods were partially lost, as here, then it was fairly inferable that while payment was to be made according to "landed weights," the seller should not be deprived of the right to show that these "landed weights" were diminished by loss or damage due to the risk of the voyage. Warner, Barnes & Co., Ltd., v. Warner Sugar Refng Co., 247.

2. *Contracts — Damages for failure to deliver — Time of delivery — Nominal damages — Personal Property Law,* § 148.— Where a contract for the sale and delivery of five hundred bales of cotton linters fixed no time for delivery except that the goods were to be sent in shipments of not less than sixty bales at a time, and the seller upon making delivery of one installment repudiates the contract, the measure of damages in an action by the buyer for breach of the contract is by section 148 of the Personal Property Law fixed at the difference between the contract price and the market price of the goods at the time of defendant's refusal to deliver. Although the writings were silent on the point, the question whether any agreement as to the time of performance was reached by parol was submitted to the jury under a charge that if they found there was such a time fixed, the market conditions as of that time were the proper criterion of damages and that if they found no time fixed they might determine what was a reasonable time for performance and measure the damages accordingly. Later, upon request, the jury were correctly instructed that if they found no time for delivery was fixed, the damages were to be computed as of the time of the breach of the contract. *Held,* that a motion to set aside a verdict for nominal damages will be denied. Continental Cotton Co., Inc., v. Mann, 280.

3. *Goods to be manufactured — Loss in transit — When delivery to carrier passes title — Allowance by seller of freight charges paid by buyer immaterial — Personal Property Law,* § 100, *rule* 5.— In an action to recover the price of goods to be manufactured but lost in transit it appeared that plaintiff shipped the goods to defendant's place of business under a straight bill of lading. It further appeared that plaintiff, by the usual course of business between the parties, had authority, even if not expressly given at the time of the making of the contract, to deliver the goods to a carrier for transmission. *Held,* that defendant must be deemed to have impliedly consented to plaintiff's appropriation of the goods to the contract upon the delivery of the same to the carrier unless from other circumstances a contrary intent could be inferred. A con-

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SALES — Continued.
tention that such contrary intent was to be presumed by reason of the fact that though it was the custom of the parties that the defendant should in the first instance pay the freight charges, it was permitted to offset such charges against the purchase price, was untenable. The order for the goods was given upon the same terms as previous orders, the invariable course of dealing being that plaintiff shipped the goods without paying the freight and deducted the charges, which defendant paid, from the agreed purchase price of the goods. *Held*, that the carrier was the agent of the defendant and that delivery to it of the goods passed the property therein to it. The rules laid down in section 100 of the Personal Property Law made no changes in the law where under the agreement of the parties the buyer was to pay transportation charges even though thereafter he could deduct such payment from the purchase price, and the contention that under rule 5 of said section the carrier is intended to be the agent of the seller and not of the buyer is supported neither by reason nor authority, and cannot be sustained. The rule that title to goods which were not *in esse* at the time the contract was made, does not pass to the buyer until he has had an opportunity to inspect them, held not to apply. The judgment entered in favor of defendant based upon a holding of the trial justice that the goods were never appropriated to the contract with the consent of defendant, and that the property in the goods and the risk of loss did not pass to it upon delivery to the carrier, reversed and a new trial ordered to the end that maybe evidence tending to show more clearly the actual agreement of the parties will be given. Columbia Mills, Inc., v. Machenbach Import Co., 283.

4. *Statute of Frauds — Buyer not required at time of sale to accept goods or to receive any part thereof — Defendant's statement that he had bought a certain boatload of potatoes constitutes an acceptance — Place of delivery — Purchaser assuming dominion over goods — Liability of defendant for purchase price confirmed by letter deferring payment — motion for new trial denied — Personal Property Law*, §§ 85(3), 124(3).— The Personal Property Law, section 85 (Laws of 1909, chap. 45, as amended by Laws of 1911, chap. 571), does not require that at the time of a sale of goods the buyer shall accept or receive any part thereof. In an action by a cultivator of seed potatoes to recover $11,124.86, the purchase price of a cargo of seed potatoes sold to defendant, a New York potato dealer, under an oral contract upon which no earnest money was paid, proof that defendant stated to two or three other potato growers, that he had bought this particular boatload from plaintiff, constitutes an acceptance thereof by defendant under section 85(3) of the Personal Property Law which provides that, "There is an acceptance of goods within the meaning of this section when the buyer, either before or after the delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods." The plaintiff on the same day that he notified defendant that the potatoes were in the canal boat *Malinda Reilly* notified the captain that he had sold the potatoes to the defendant, having previously informed the captain of the sale, and advised

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SALES — Continued.
him to call on defendant in a day or two to find out when he would start to unload the boat. After the captain over the telephone had told defendant plaintiff's name and the name of the boat, defendant told him he would start the boat next Monday or a week from Monday and the captain said that would be all right. In the same conversation the defendant admitted that the potatoes had been sold to him by the plaintiff. *Held*, that under section 124 of the Personal Property Law the canal boat was the place of delivery and the captain having pursuant to subdivision 3 of said section acknowledged to defendant that he held the potatoes on defendant's behalf, the defendant by his statement to the captain as to when he would begin taking the potatoes off the boat, assumed dominion over them and was liable for the purchase price. A letter written by defendant to plaintiff after telling the captain when he would start unloading the boat, in which letter he in no wise repudiated the contract, except that he deferred payment on account until he started to unload the boat, evidenced his assent to become the owner of the potatoes. The answer alleged that the agreement sued on was for the sale of goods in excess of fifty dollars; that no agreement in writing was ever made and subscribed by defendant; that he did not at the time of the alleged sale accept or receive any part of said goods or at any time pay any part of the purchase price. *Held*, that assuming that the defense of the Statute of Frauds was properly pleaded, a motion for a new trial after a verdict in favor of plaintiff will be denied. Flanigan v. Waterman, 617.

See **Evidence**; **Warranty.**

SAVINGS BANKS.

1. *Deposit of proceeds of a larceny belongs to owner of stolen property.*— F., one of the defendants, a clerk in the hotel at which defendant M. resided, and in charge of the delivery and receipt of valuables of guests for deposit in the vaults of the hotel, sold jewelry belonging to M. and the next day under an *alias* deposited with the plaintiff bank, not the amount received for the jewelry but a substantial sum the acquisition of which was not explained. In an action to determine the ownership of the deposit which was claimed by various defendants, *held*, that it was a reasonable deduction that the fund in bank was a part of the proceeds of the larceny and should go to the defendant M. Emigrant Industrial Savings Bank v. Foye, 706.

2. *When dividends on deposits, principal and not income.* Matter of Warren Snyder, 371.

See **Banks and Banking.**

SEARCH WARRANT.

See **Criminal Procedure**; **Intoxicating Liquors.**

SEPARATION.

See **Husband and Wife.**

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SHIPS AND SHIPPING.

Contracts — Carriers — Wharfage — Agreement by consignee to pay pro rata charge for heated pier enforced.— Plaintiff was the consignee of more than 6,000 cases of onions which were expected to arrive in New York on or about February 24, 1920, on a steamship operated by defendant. In anticipation of the arrival of the vessel, plaintiff, with other consignees of similar goods, being desirous that the cargo should be unloaded at a heated wharf, where there would be no danger of the cold weather injuring the onions, signed a writing addressed to defendant by which, in consideration of its engaging a certain heated pier for the discharge of the cargo of onions, the consignees agreed, in the event that the vessel did not dock on or before February 24, 1920, to pay the defendant the sum of $330 per day as the cost of said pier up to the date of her docking, upon condition that whenever the vessel docked the charges to the consignee for wharfage should commence forty-eight hours after the termination of the discharge of the cargo. The ship did not arrive until three days after said February twenty-fourth and after the cargo had been discharged defendant sent to plaintiff a check for $442.36 with a statement showing that plaintiff had been charged for wharfage and other expenses the difference between the amount of said check and the amount of plaintiff's "wharfage deposit" which it had made under protest. The plaintiff refused to accept the check and brought this action to recover the full amount of the deposit. *Held*, that though defendant was not bound to provide a heated wharf, it had a right to contract to furnish such a one for additional compensation and that plaintiff having acted upon the agreement was bound by its terms. A contention that the agreement was unenforcible as against public policy on the ground that defendant in any event was bound to furnish a proper place for the landing of the cargo and had no right to demand extra payments to enable it to comply with its own obligation, was untenable. Plaintiff's obligation, under the contract, being limited to its *pro rata* share of $330 per day from February twenty-fourth to the date of the arrival of the vessel, the judgment in favor of plaintiff for the full amount of the wharfage deposit was erroneous, and will be reversed unless plaintiff stipulates to reduce the judgment by its *pro rata* share of $990, in which event the judgment as modified will be affirmed, without costs to either party. Kronman & Co. v. Texas Transport & T. Co., 300.

See **Workmen's Compensation Law.**

SPECIFIC PERFORMANCE.
See **Contracts; Vendor and Purchaser.**

STATE INDUSTRIAL COMMISSION.
See **Workmen's Compensation Law.**

STATUTE OF DISTRIBUTIONS.
See **Wills.**

STATUTE OF FRAUDS.
See **Contracts; Sales.**

STATUTES.
See *ante*, p. xlv *et seq.*

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STOCKBROKERS.
Liability for delivery to wrong person by mistake
See **Bailment.**

STOCK DIVIDENDS.
Relative rights of life tenant and remaindermen.
See **Accounting.**

STREET RAILWAYS.
Fare — Municipal corporations — Franchise — Legislative authority — Legislature has full power to determine conditions local authorities may attach to railroad consents — Rate of fare subject to regulation by legislature — City of Troy — Public service commission has jurisdiction to fix rates, notwithstanding franchise agreement — Writ of prohibition denied — Public Service Commissions Law, as amended by Laws of 1921, *chap.* 335.—While a city although having no constitutional authority to prescribe the rate of fare may impose as a condition to the giving of its consent to the operation of a street railway within the corporate limits that a stipulated rate of fare shall be charged, the legislature has full power to determine the conditions that local authorities may attach to railroad consents to be given in the future. The state's right to regulate fare, which necessarily includes the power to increase the same, if inadequate, is an implied part of any contract for the operation of a railway upon the streets of a city and the rate of fare provisionally fixed by such a contract is subject to regulation by the legislature. Where, therefore, the United Traction Company, the successor in interest of several street railroads formerly operating under franchises created by the city of Troy on August 5, 1890, and at various times thereafter down to November, 1895, upon consents which provided that the rate of fare to be collected should not exceed the sum of five cents, made an application to the public service commission, which under the statute (Public Service Commissions Law, as amended by chapter 335 of the Laws of 1921), has full jurisdiction to fix reasonable rates "notwithstanding that a higher or lower rate, fare or charge has been heretofore prescribed by general or special statutes, contract, grant, franchise condition, consent or other agreement," for permission to increase its rate of fare within the city to the sum of eight cents, an application on the part of the city for a writ of prohibition commanding the public service commission and the railway company to refrain from proceeding on such application for an increase of fare will be denied, on the ground that there being no question involved as to the annulment of a condition, the abrogation of a defeasance or impairment of an obligation, the commission has both jurisdiction and power to grant the particular relief asked for, so far as the local franchises are concerned. Matter of Fleming, 373.

SUMMARY JUDGMENT.
See **Judgment; Motions and Orders.**

SUMMARY PROCEEDINGS.
See **Evidence; Landlord and Tenant.**

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SUNDAY.
See **Contracts.**

SUPPLEMENTARY PROCEEDINGS.
See **Municipal Court of the City of New York.**

SURROGATES' COURTS.
1. *Practice — Filing copy of lost instrument — Appointment of administrator with the will annexed denied — Successor trustee appointed.*—All three executors under a will which created specific trust died without filing an account of their proceedings. Two of the successor trustees being unable to agree upon the appointment of a third trustees, as authorized by the will, the beneficiaries of the trust filed a petition for the appointment of a third successor trustee as well as for the appointment of an administrator with the will annexed. *Held*, that the answer of one of the successor trustees, who asked leave to file *nunc pro tunc* a copy of a writing signed by one of the deceased trustees, could be used only as an objection to the granting of the letters asked for and not as a basis for the taking of proof and decision thereon, with relation to the granting of letters to a successor executor. Application for appointment of administrator with the will annexed denied, and a third successor trustee appointed. Matter of Samuel J. Tilden, 656.

2. *Real property of non-resident within jurisdiction — Power to fix bonds of testamentary trustees — Decedent Estate Law, § 44, as amended in* 1921 — *Surrogate's Court Act, § 171.* Matter of Isaac Walker, 805.

See **Guardian and Ward**; for **Surrogate's Court Act**, see *ante*, p. 1.

TAXATION.
1. *Cemetery lands — Former statute exempting land of cemetery association from local taxation, held repealed — Description of property — Assessment invalid — Assessment of land including tax exempt cemetery property, exempts entire plot — Assessors individually liable for taxes where assessment made without jurisdiction — Exemption not lost by use of unoccupied portion for farming purposes — Description — Boundaries govern — Laws of* 1896, *chap.* 908, § 4(7), *amended by Laws of* 1909, *chap.* 62; *Laws of* 1847, *chap.* 133, § 10; *Laws of* 1879, *chap.* 310.— Before the statute (Laws of 1896, chap. 908, § 4(7), now Laws of 1909, chap. 62, same section and subdivision) all lands of cemetery associations whether organized under chapter 133 of the Laws of 1847, or chapter 310 of the Laws of 1879, and whether actually used for cemetery purposes or otherwise were absolutely and entirely exempt from taxation, but by the addition of such changes in phraseology as were deemed necessary in rewriting the law, the entire law upon this subject was changed. The statute (Laws of 1847, chap. 133, § 10) which expressly exempts from local taxation all cemetery lands of any association organized pursuant thereto is so inconsistent with the later statutes (Laws of 1896, chap. 908; Laws of 1909, chap. 62) that it must be conclusively deemed to have been

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repealed thereby though not expressly included in the repealing section of either of those statutes. It does not follow, however, that all land not actually occupied by graves is taxable. In an action to recover money paid for taxes by a cemetery association organized under chapter 133 of the Laws of 1847 it appeared that the greater part of a tract of land purchased by the plaintiff years ago to be used as an annex to the cemetery grounds then owned by plaintiff in the city of Corning, N. Y., lies in about the same condition as when purchased. *Held*, that the right of such lands to exemption from taxation under the statute was not lost by proof that plaintiff in an endeavor to avoid unnecessary expenditure for care and upkeep derived some income from the use of the unoccupied part of its lands for farming purposes. The local assessors in the *bona fide* belief that such lands were being so used and that plaintiff was reaping the incidental benefit, after consultation with the attorney-general and the officials of the state tax department, assessed said lands in 1914, 1915 and 1916 upon the tax rolls of the city, in substantially this language: "Twenty acres on south side of City line, bounded north by City of Corning, south and east by land of Joel Wicks, and west by land of Robert O. Hayt." *Held*, that under the rule that where both quantity of land and specific boundaries are included in a description, the boundaries must govern, the assessment was in any event entirely without warrant of law. The power to determine what property shall be exempted from taxation is vested solely in the legislature and the defendant assessors having assessed the entire tract, a part of which has been plotted and improved and is now occupied by graves, tombstones and similar memorials, and clearly exempt from taxation, the defendants are individually liable upon the ground that in making the assessments they acted without jurisdiction, and judgment is directed in favor of plaintiff. Hope Cemetery Association v. Rose, 457.

2. *Certiorari — Property of fraternal order — Statutes exempting property construed against owners — Lodge building devoted to many and different purposes not exempt — By-laws held to permit use of surplus for purposes not contemplated by statute — Benevolent Orders Law, § 7 — Tax Law, § 4(7).* — Under the rule that statutes exempting property from general taxation must be strictly construed against the property owners, and that exemption may not be presumed unless plainly expressed, it is clear that section 7 of the Benevolent Orders Laws, under which relator was incorporated, and section 4(7) of the Tax Law, under which relator claims exemption of its real property from taxation, contemplate a building to be used for lodge purposes with an occasional use for other fraternal purposes, and not a building as here shown devoted to and used for many and different purposes. While section 6 of the relator's by-laws directs the use of all surplus moneys for certain benevolent purposes which are within the contemplation of the statute, it also specifies "such other benevolent or charitable purposes as the board may direct," and so permits the board to direct the use of the surplus for purposes not contemplated by the statute, and for all these reasons the writ of certiorari to

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TAXATION — Continued.
review the assessment herein will be dismissed. People ex rel. S. O. F. T. A. v. McMillan, 600.

See **Transfer Tax.**

TAXICAB.
See **Lien Law.**

TENANTS IN COMMON.
See **Adverse Possession.**

THEATRE.
See **Municipal Corporations.**

TRANSFER TAX.
1. *Strict construction of statute — Where a tentative trust is not revoked upon donor's death a presumption arises that an absolute trust was created and the life estate created thereby is not subject to a transfer tax — Laws of* 1905, *chap.* 368, § 220, *subd.* 3.— The transfer tax is the tax on the privilege granted by the state to an individual to succeed to the property of a deceased person; and a statute imposing such a tax must be strictly construed against the state and upon it lies the burden of proving the tax. By a trust deed expressly reserving to the grantor at her will and pleasure, by will or other written instrument signed by her and delivered to the other party to the trust deed, full power to revoke it and all the trusts, powers and rights thereby created, a tentative trust is created, but upon the donor's death without having revoked the trust deed, the presumption arises that an absolute trust was created. Such a deed constitutes a transfer of a life estate in property provided for in the deed, and in the absence of extrinsic evidence showing that the deed was intended to take effect after the donor's death, it must be held that, within the meaning of the statute (Laws of 1905, chap. 368, § 220, subd. 3) in force at the death of the donor, the deed was intended to and in fact did take effect in possession and enjoyment at its date and the life estate created thereby is not subject to a transfer tax. Matter of Eva S. Cochrane, 18,

2. *Trust deed — Gift to take effect at death of decedent — Tax Law,* § 220(4).— Decedent had executed a deed which provided for the transfer of $5,000 upon the trust to pay the income to him during his lifetime and upon his death to pay to the *cestui que trust* the principal with accumulations of income not theretofore paid. In the event of the prior decease of the *cestui que trust*, the principal of the trust fund with all accumulations of income was to be paid on demand to decedent and the trust thereupon to terminate. The deed also provided that the trust might be terminated by decedent at any time upon written notice to the trustee, in which event the securities or cash composing the trust fund were to be delivered by the trustee to decedent and become his property as if the deed had not been made. Three years later the deed was modified by a written agreement which in effect provided that nothing therein

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contained should transfer any ownership to the *cestui que trust* prior to the death of decedent, unless she made demand therefor during her lifetime. She made no such demand and received no part of the principal of the trust fund. *Held*, that the gift to her took effect in possession and enjoyment at the death of the decedent, and under section 220(4) of the Tax Law was subject to a transfer tax. Matter of Edward Flynn, 90.

3. *Evidence — Residence — Presumption in favor of an original as against an acquired domicile — Burden of proof — Property of decedent as non-resident subject to tax — Tax Law*, § 243, *as amended by Laws of* 1919, *chap.* 629. — By virtue of section 243 of the Tax Law (Laws of 1916, chap. 551, as amended by Laws of 1919, chap. 629), the burden of proof in a transfer tax proceeding is upon those claiming exemption by reason of the alleged non-residence of their decedent, which declares that "every person shall be deemed to have died a resident and not non-resident of the state of New York if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death." Decedent, who was born at Greenwich in the state of Connecticut in 1839, died in the month of July, 1920, at Port Chester; New York, where he had continuously resided with his family since January, 1900, having acquired real estate there by inheritance. He never resided elsewhere than at either of these two places, both of which are not far distant from the boundary line dividing the states of Connecticut and New York. He was made a freeman in Greenwich in 1861 and continued to exercise his communal relations in Connecticut until 1913, always attending and taking part in the town meetings. He never voted elsewhere and in more than four hundred deeds, mortgages and other papers recorded in Greenwich, in Westchester county and Kings county, N. Y., he was always mentioned and described as a resident of Greenwich and he declined to receive or execute papers in which he was otherwise described, and furthermore he protested his assessments in Port Chester. No attempt was made by the state tax commission, in a transfer tax proceeding, to controvert these facts, established by the executor. *Held*, that the burden laid upon the executor by the statute has been met by evidence abundant and convincing, indicating an undeviating determination on the part of decedent not to abandon his domicile of origin in the state of Connecticut, either in law or fact, and that domicile must govern in the administration of his estate. A contention on behalf of the state tax commission that a residence of years in another state in conjugal relationship supplies the intent to change a person's domicile and in fact creates a new domicile of choice for him without the operation of his mind, is untenable under the decision in *Dupuy* v. *Wurts*, 53 N. Y. 556–561. The transfer tax proceeding remitted to the transfer tax appraiser in Westchester county, N. Y., to appraise the property of the decedent therein, as a non-resident under the provisions of section 243 of the Tax Law in force at the time of decedent's death. Matter of John Lyon, 189.

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TRANSFER TAX — Continued.

4. *Husband and wife — Joint tenancies in personal property created prior to the addition of subdivision* 7 *to section* 220 *of the Tax Law* (*Laws of* 1915, *chap.* 664) *and tenancies by the entirety created prior to the amendment of said subdivision by chapter* 323 *of the Laws of* 1916 *are taxable upon one-half of their respective values upon the death of one of the tenants — Such tenancies created subsequent to the above enactments taxable at full value — Contribution by survivor to fund immaterial.*—Where a joint tenancy in personal property was created prior to the addition of subdivision 7 to section 220 of the Tax Law (Laws of 1915, chap. 664) and a tenancy by the entirety was created prior to the amendment of said subdivision by chapter 323 of the Laws of 1916, one-half of the value of the personal property and one-half of the value of the real property is taxable upon the death of one of the tenants. Where such tenancies were created subsequent to each of the enactments above referred to the entire value of the personal property and the real property is subject to a transfer tax. Proof that the survivor contributed all of the funds that went into the purchase of the properties was not a reason for a modification of the order made herein, and the same is affirmed. Matter of Clara Koch, 277.

5. *Non-resident —Law of domicile governs succession to personal property —When bonds and notes of New York corporation not taxable under section* 220(2) *of the Tax Law, as amended.*—The right of succession to personal property is governed by the law of the domicile of the owner at the time of his death. Where decedent, who died intestate a resident of the state of California, at the time of his death there was the owner of and had in his possession certain bonds and promissory notes of a New York corporation whose principal asset was real property in this state, upon which said bonds and notes were not in any way a lien, and it also appeared that a tax under the Inheritance Tax Law of California had been assessed and paid upon said bonds and notes, which have not since the death of decedent come into the state of New York, they are not subject to a transfer tax here under section 220(2) of the Tax Law, as amended. Matter of Charles Kierstead Meyer, 511.

6. *Wills — Construction of — Testator's intention overcomes palpable error in describing fractional share — Legacies taxable.*— Where in a gift of the entire estate of testatrix in equal shares to her five sisters, naming and describing them, the bequest is by palpable error made to read "one-fourth" in place of "one-fifth," the evident intent of the testatrix must be carried out by the exclusion of "one-fourth," and since upon such construction the share of each sister exceeds $500, it is subject to a transfer tax. Matter of Antoinette Vismar, 554.

7. *Will admitted to probate in Texas where estate was taxed — Declarations of decedent and her supporting acts and conduct sustain finding that she was a nonresident of the state of New York at her death.* Matter of Dellora C. Gates, 800.

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TRANSFER TAX — Continued.

8. *No deduction for federal estate tax — Tenancy by entirety taxable at one-half value — Pensions created by unrevoked deed of trust not taxable — Decedent Estate Law,* § 17. Matter of Andrew Carnegie, 806.

9. *When contingent remainders taxable — Tax Law,* § 241 — *Refund under section* 230 — *Taxation against one per cent class.* Matter of Frank Trumbull, 812.

TRUSTS.

1. *When parents create a trust with power of revocation to be executed by both, survivor cannot terminate the trust — When increase of corpus from income not an unlawful accumulation under Personal Property Law,* § 16 — *Gift of income to children held to continue during father's pleasure only — Father entitled to income since date he directed payment to him.* — A trust agreement executed by the parents of the plaintiff, who at the time were living apart, provided that the survivor should receive the entire income of the trust fund, a considerable part of which belonged to the mother, and at his or her death the principal and all accumulations of income should be paid over in equal shares to their children, other than plaintiff, who for himself and his heirs waived all right of participation in the trust fund. The trust agreement contained the following: "It is expressly agreed and made part of this instrument that the terms and conditions hereof and of the trusts and estates herein created or any of them may from time to time be revoked, modified or changed in any particular by instrument in writing, duly signed and acknowledged by the parties of the first part and delivered to the party of the second part or his successors in trust." In an action for the settlement of the accounts of the trustees and for instructions as to his future administration of the trust, *held,* that the father had no right to revoke the trust agreement after the decease of his wife, as to hold otherwise would defeat one of the most important purposes of the trust, to wit, the creation of remainders in the children of the trustors, and would be subversive of the intent expressed in the revocation clause of the trust agreement. Under the trust agreement the mother during her lifetime was entitled to and did receive the income of the trust fund up to $5,000 a year and the balance belonged to the father, who, as satisfactorily shown by the evidence, orally instructed plaintiff to add his share of the income to the corpus of the trust, his express desire being to increase the fund for the benefit of his children. Plaintiff acting upon such instructions paid over to the other defendants their designated shares of the income for a long period until May 21, 1920, and his course was approved by his father from time to time. *Held,* that such disposition of the income was proper; that the father had a right to increase the corpus of the trust and whether it was done from his share of income or from other sources was immaterial, and his contention that such direction would be void and in violation of section 16 of the Personal Property Law, which refers solely to direction for accumulation of income contained in an instrument in writing, was untenable, as that statute did not apply here. Where the evidence showed that one of plain-

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TRUSTS — Continued.
tiff's sisters by the express direction of her father was excluded from participation in the income during a certain period, the plaintiff trustee will not be personally surcharged with the amount she claims as her share of the income. It clearly appearing that the father's gift of the income to his children was a voluntary act, to continue only during his pleasure, the whole income from the trust fund since the date upon which he directed it to be paid to him belongs to him, except the amount directed to be paid to one of the daughters. Croker v. Croker, 558.

2. *Deed containing revocation clause — Directions as to payment of income, principal and accumulated dividends, etc.— Colleges to take in event of no survivor capable of taking — Subject matter of trust was in New York when settlor, who died a resident of California, executed deed in Mexico — No suspension of absolute ownership beyond two lives in being — Contingent remainders — Evidence — Depositions of executor of settlor and another interested in event of action incompetent under Civil Practice Act, § 347 — Burden of proof as to change of domicile of settlor from United States to Mexico.*— A deed of trust containing a revocation clause provided that all the dividends, interest and income collected by the trustee should be paid to the settlor of the trust, so long as he should live, and thereafter to a nephew during his life and upon his death to his wife for life, with direction that upon the death of both the nephew and his wife the trustee should pay one-half of the principal and unpaid accumulated dividends, interest and income, to Harvard College absolutely, and one-fourth to another college absolutely. The remaining one-fourth in equal shares was to be paid to the niece and two nephews of the settlor, or to such of them as should survive him, with proviso that if any of them predeceased him leaving issue the share of any deceased nephew or of the niece was to be paid to their surviving issue. If there were no survivor capable of taking the last quarter of the trust property, two-thirds thereof was to go to Harvard College and the remainder to the other college. The settlor, shortly before leaving Mexico, where he had resided for about four years, to take residence in California where he died and where his will was admitted to probate, duly acknowledged the execution of the trust agreement before the United States consul in the city of Mexico, and the trustee, in the city of New York, to whom the instrument had been mailed by the settlor, executed the same in the usual New York form. The subject matter of the trust was then in the city of New York, and the beneficiaries thereunder within the United States. In an action for the judicial settlement of the accounts of the successor trustee and for a determination as to the validity of the trust agreement, and whether the beneficiaries were entitled to take their respective shares therein mentioned, the executor of the settlor asked for a decree giving to him in his representative capacity the corpus of the trust fund for distribution under the will of his testator, upon the grounds (1) that no trust was created by the alleged trust agreement because the settlor did not at any time divest himself of the legal title to the subject matter of the trust; (2) that under the Mexican law, which it was claimed was controlling the purported trust agreement was invalid for any purpose; (3) assuming that the settlor did divest

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TRUSTS — Continued.
himself of title, the attempted trust was invalid under the law of New York, and (4) that in any event the one-fourth contingent remainder to niece and nephews or their issue, with gift over to the colleges, was also invalid under the laws of New York. *Held,* that because of the reserved power of revocation the trust deed did not suspend the absolute ownership of the property, measured by the lives of the settlor and the nephew and his wife. The gifts over in favor of the colleges of one-half and one-quarter respectively of the trust property were contingent and not vested, but both were valid, and will vest after the expiration of the only two measuring lives. The remaining one-quarter of the trust fund upon the death of the life beneficiaries was also contingent, but after the termination of the two measuring lives will vest absolutely in one or more of the persons mentioned, if living, or in their surviving issue, and failing any such, in the two colleges, and the only uncertainty is as to the persons in whom said quarter of the trust fund will vest after the termination of the limiting life estate. Where duly taken depositions of the executor and of another witness also interested in the event of the action within the meaning of section 347 of the Civil Practice Act were offered in evidence in support of a claim that the settlor of the trust had changed his domicile from the United States to Mexico, an objection to their reception as incompetent, on the ground that it was sought to prove a Mexican domicile by the settlor's own statement to said witnesses, will be sustained. The depositions having been excluded there was not sufficient other evidence to sustain the claim of a change of domicile. Equitable Trust Co. v. Pratt, 708.

See **Accounting; Transfer Tax; Wills.**

USE AND OCCUPATION.
See **Landlord and Tenant.**

VENDOR AND PURCHASER.

1. *Title — Specific performance — Maintaining garage in city of New York in which vehicles are stored for hire, in violation of building zone resolution, held not to constitute an incumbrance — Notice from fire department — Deduction from purchase price refused — Complaint dismissed.*— Where a contract for the sale of premises subject to building restrictions and regulations, etc., provided that all notices of violations of law or municipal ordinances noted in or issued by the fire department of the city of New York against or affecting the premises at the date of the contract, shall be complied with by the seller, and the premises conveyed free of the same, an order of the fire department, since complied with, served upon the seller to discontinue the maintenance of a garage in which were kept motor vehicles which are subject to charges for storage in violation of a duly adopted zoning resolution, which violation had its inception before and had continued since the date of contract of sale, creates no incumbrance upon the title, the situation being covered by the express terms of the contract but even if this were not so, the zoning resolution did not constitute such an incumbrance. Where in an action in equity to procure a judgment for an abatement upon the purchase price of the premises by reason of the alleged defect in title, or in the event that it be adjudged that defendant cannot convey a

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good title, that plaintiff have judgment for the amount of his deposit on the purchase price with interest, the answer, which was practically a general denial, alleges that the only reason why plaintiff refused to accept the deed tendered by defendant and offered to pay the balance of the purchase price, was said order of the fire department and it is apparent that in any aspect than can be taken of the case, plaintiff is not entitled to an abtement from the purchase price on account of loss of income be expected to get from the premises and it is clear that plaintiff and not defendant had failed to comply with the terms of the contract, he cannot recover back the money paid thereon, and defendant is entitled to judgment dismissing the complaint upon the merits with costs. Moss v. Rubenstein, 385.

2. *Right of way — Real property — Contracts — Equity — Reformation of instrument — Agreement "subject to all leases" held to include right of way for pipe line for oil or gas — Vendee's sale of personal property waived alleged defect in title to realty — Estoppel — Specific performance — Equity will reform contract though not requested in pleading.*— Where from surrounding facts and circumstances the intent of the parties to a written contract, in their mistaken use of a particular word is plain, parol evidence is admissible to show its intended meaning and its precise and technical meaning cannot be insisted upon. Where a written contract fails to express the real agreement of the parties, the court in the exercise of its equity powers, upon a proper case made, is in duty bound to reform the contract even though in an action thereon the defendant by his answer has not asked for a reformation. A contract for the purchase of a farm lying in part on both sides of a highway, and also certain personal property, in express terms provided that, "The above described property is being sold subject to all leases against the property with the Iroquois Natural Gas Co." After the intending purchaser had entered into possession there was delay in closing the deal but finally the title was rejected on the alleged ground that a certain right-of-way owned by a company, to lay, maintain and operate a pipe line for the transportation of oil or gas over the farm, rendered the title bad. In an action to recover the amount paid on the contract when it was made, and also to recover certain amounts claimed to have been expended on the property in excess of those received for produce sold, the answer put in issue certain of the allegations of the complaint and prayed for a specific performance of the contract. It was established on the trial that plaintiff knew of the pipe line, made no objection to it and, in connection with the statement that he had paid too much for the farm, said to defendant's attorney, referring to the well and line, which gave his house a full supply of gas, that those were the only things that made him buy the farm. *Held*, that the word "leases" in the contract which was drawn by one not a lawyer, was intended to describe the very right-of-way to which objection was made; otherwise the word which in itself was a misnomer, would be meaningless. The action of plaintiff, who still is in possession of the farm, in selling a considerable portion of the personal property on the place, which he had no right to do

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VENDOR AND PURCHASER — Continued.
until payment of the purchase price according to the terms of the contract, was a waiver of the alleged defect in the title, and he cannot be heard to insist upon the objection now. Judgment for the reformation of the contract and for the specific performance of the same as reformed. Schultz v. Busendorf, 405.

VENUE.

Change of place of trial — Land under water — Boundary line between New York and Kings counties is actual line of low water on Brooklyn side — Where property situate in two counties action may be brought in either county — Civ. Pr. Act, § 183.— The boundary between the counties of New York and Kings is the actual line of low water on the Brooklyn side whether corresponding with the original low water line of the East river shore or varied by permanent encroachment of docks, piers and wharves. A complaint after describing water front property located at and in the vicinity of the foot of Hamilton avenue, borough of Brooklyn, owned by plaintiffs and defendant, respectively, alleged that defendant maintains a ferry house and appurtenances at the foot of the avenue, and that the rack on the southerly side of its ferry slip was within ten feet of plaintiffs' pier, that defendant's structures deprived plaintiffs of the use of their bulkhead and along the northerly side of their pier and that said structures constitute a public nuisance which particularly injures and violates plaintiffs' property rights. *Held,* that under the decisions establishing the boundary line between the counties of New York and Kings, plaintiffs' bulkhead and pier are in Kings county and the land under water in the southerly view of defendant's ferry slip and on and over which its rack is maintained in New York county. Both properties together are to be regarded as the "subject of the action" within the meaning of section 183 of the Civil Practice Act and the venue of the action is properly laid in Kings county. A motion by defendant for an order changing the venue to New York county, based upon the provisions of said section 183, denied. Fairchild v. Union Ferry Co., 470.

VERDICT.

See **Motions and Orders.**

WARRANTY.

Sale of bottled milk — Implied warranty that milk is fit for human consumption — Distributor held liable for illness of child caused by worms in milk.— Upon a sale of milk to be used as food there is an implied warranty of its fitness for human consumption even though the seller is merely a distributor of the product. The mother of plaintiff having bought of defendant a standard quart bottle of "Certified Milk" which was produced at the Wilmarth Farms, Kingsley, Penn., and sealed in conformity with the standards of the Kings County Medical Society, added boiled water to a portion of the milk for the use of plaintiff who was then eighteen months old and who toward evening on the same day became ill. An examination by the child's father showed small worms attached to the inside of the glass bottle and the remainder of the milk was kept and delivered by the guardians of the child to their family physician. In an action for negligence the complaint alleged *inter*

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WARRANTY — Continued.
alia that the illness of the child was due to the carelessness, recklessness and negligence of the defendant in the preparation of the milk and without contributory negligence on the part of the infant plaintiff or that of his guardian *ad litem*, and further, that the mlik was unfit for human consumption and contained worms which caused the infant plaintiff to become ill. The family physician's diagnosis was gastrointeritis or inflamed condition of the stomach and intestines, and he testified that the inner surface of the bottle was saturated with little organisms or worms and that the nearest thing he could compare them with was "dragon fly larvae," and he also testified that the presence of these organisms in the milk was a competent producing cause of the child's illness. The physician who was authorized by the Kings County Medical Society to pass upon the milk produced at the Wilmarth Farms testified that, on one occasion, four years prior to the one in question, worms were present in the milk and indicated that these worms came from a reservoir used for the storage of water; that the worms had gotten into the reservoir from the surface, and that the water was used to wash the rims of the bottles and in that way the worms got into the bottle. It also appeared that the bottles and the caps which sealed them were furnished by the defendant, who was merely the distributor of the milk, but that the actual bottling and sealing thereof was done at the Wilmarth Farms, and that no employees of the defendant were employed there nor was any employee of defendant engaged in the bottling process. The trial justice after granting plaintiff's motion to amend the complaint to conform to the proof so as to claim to recover upon the theory of an implied warranty in the sale of the milk, and in the mistaken belief that such was the only cause of action, dismissed the complaint upon the merits. Upon reversing the judgment entered in favor of defendant and ordering a new trial, *held*, that the mere purchase of the milk made known to defendant that it was required for food; that as any one reading the printed matter on the label, "Sheffield Farms Co., Inc., Bottled at Wilmarth Farms," might well assume that the milk was the product of defendant's farm, the plaintiff had a right to assume that defendant had the opportunity to examine the milk. Lieberman v. Sheffield Farms, 531.

See **Wills.**

WASTE.
See **Injunction.**

WATERS AND WATER COURSES.
Lands bounded on rivers and streams above tidewater — Rules of the English common law do not apply to lands bordering on the Hudson river and the Mohawk river — The title to the bed of the Hudson river and the bed of the Mohawk river is in the state of New York — Franchises — Compensation for appropriation of lands in accordance with the provisions of the Barge Canal Act — Title to the bed of the Hudson river in the state of New York not divested by chapter 164 *of the Laws of* 1901.— The state of New York, pursuant to chapter 147 of the Laws of 1903, appropriated for the Champlain canal lands and flowage rights of claimant extending on both sides of the Hudson river above tidewater for a dis-

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WATERS AND WATERCOURSES — Continued.
tance of about two and one-half miles. The lands form part of original grants under English Colonial Patents. By chapter 164 of the Laws of 1901 claimant was "authorized to construct a dam across the Hudson river on the lands now owned by it or which it shall hereafter purchase or acquire * * * to forever maintain said dam and to flood back up said river so far as it owns or shall hereafter purchase or acquire the adjacent uplands * * * for the purpose of maintaining the pond formed by such dam; and any interests of the state in lands under the waters of said river covered by said dam or which may be flooded by the erection thereof or under any works which said company shall construct on or adjacent to said dam is hereby granted to said company, its successors and assigns." Claimant did not construct its dam and never obtained the consent of Congress to do so in accordance with the River and Harbor Act of March 3, 1899, but, relying upon said act of the legislature, it acquired a considerable part of its frontage on said river and made expenditures for the development of its property in reliance upon the provisions of said act. *Held*, that the rule of the English common law that grants which are bounded on rivers and streams above tidewater are presumed to extend to the middle of the stream has never been applied to colonial grants or state grants of lands bordering on the Hudson river and the Mohawk river, these rivers being an exception to the general rule because of their size, location and commercial importance, and the public use made of them from the earliest days as means of transportation and communication; that at the time of the enactment of chapter 164 of the Laws of 1901 the title to the bed of the river was in the state of New York and that the state's ownership was not divested and vested in claimant by the mere passage of said act. It was contemplated by said act that a dam should be erected and certain works constructed, in which event the title of the state to the lands under the waters of the river covered by said dam or flooded by its erection should pass to claimant. Said act, however, did grant to claimant a franchise which, having been accepted and acted upon, cannot be repealed, revoked or destroyed by the state appropriating it without compensation. The state having appropriated claimant's land in accordance with the provisions of the Barge Canal Act, claimant is entitled to compensation for its property taken for the public use, and for a judgment against the state in the amount of $250,000, with interest from June 30, 1913. Waterford El. L., H. & P. Co. v. State of N. Y., 480.

WAY.
See **Vendor and Purchaser.**

WHARFAGE.
See **Ships and Shipping.**

WILLS.
1. *When general legacies will not be charged against real estate —Relationship of parent and child as to residuary devisee outweighs any intent which might be inferred by reason of a power of sale.* —An intention to charge real estate with the payment of legacies

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WILLS — Continued.
will not be inferred if decedent may have been mistaken in her judgment as to the value of her property or was in reasonable expectancy of increasing her personal estate before her death. The primary fund for the payment of general legacies is the personal estate unless the will expressly declares otherwise, or a clear intention to the contrary is to be gathered therefrom, which may be aided by extrinsic evidence; if the contrary intention is not expressed in the will, then it must be clearly and satisfactorily inferred. An intention to charge the real estate of a testatrix will not be inferred from a disparity between the amount of the estate and the legacies, if the testatrix might have been unconscious of its existence, or mistaken in her judgment. As between a power of sale in a will being a basis for a charge of legacies upon the real estate and the existence of the relationship of parent and child as showing an intention not to create such a charge, the latter is of controlling importance and an outweighing factor on the question of the intent of the testatrix. Decedent, most of whose property was acquired under the will of her late husband, died at the age of seventy-six years, leaving her surviving no children of her body or descendants of any such. After certain general legacies, amounting to $40,500, not specifically charged upon her real estate, to her sister, nieces and nephews and to relatives of her deceased husband, all the rest, residue and remainder of her estate, both real and personal, was devised and bequeathed to "Florence A. Coombs, who grew up as a child in my family and lived with me for many years, the same to have and to hold forever," and the executor was given full power of sale over the real estate. When the will was executed, about fifteen months before the death of testatrix, exclusive of 20,000 shares of the United States Tin Company of the par value of one dollar per share, and certain mining stock which had not been transferred from her husband's name, the personal estate of testatrix amounted to about $25,000. Without testimony as to the intention of testatrix it was stipulated by all parties in interest that both at the date of the will and also at the date of the death of testatrix, the stock in both corporations had no value. The residuary legatee was a second cousin of testatrix, and from the time she was two years old stood in the mutually acknowledged relationship of parent and child to both the testatrix and her husband, was educated by them at private schools and at her marriage at the home of decedent was given a large wedding. Certain of the other legatees, relatives of decedent's husband, also lived with her for a while but not in the relationship of parent and child. *Held,* that the burden of proof resting upon the general legatees to show that it was the intent of testatrix to charge their legacies upon her real estate, had not been sustained, and it is accordingly decreed that said legacies are not a charge upon the real estate left by decedent. Matter of Charity C. Mould, 1.

2. *Trusts — Unlawful accumulation of income — Personal Property Law,* § 16 — *Person presumptively entitled to the next eventual estate — Powers of substituted trustees — Commissions of trustees — Surrogate's Court Act,* § 285.— Where testator bequeathed his entire estate in trust, and excepting $3,000 a year which he directed

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WILLS — Continued.
to be applied for the use of his sister, the net income to the amount of a certain sum, "but no more," was to be applied to the use of his daughter during her life, a further direction that the remainder of said income be applied to the use of the daughter for life, "accumulating for her benefit during her minority, and adding to the principal of the said trust fund so much of said sum as may not be required for her suitable education and support, in addition to the" former bequest to her, is void, as such accumulation of income would be unlawful under section 16 of the Personal Property Law. The daughter and not her issue is the person presumptively entitled to the next eventual estate, and the contention that her infant children are entitled to all excess income after necessary provision is made for her is untenable. Where since the daughter became of age she acquiesced in the conduct of the trustees and was content to permit them to handle the funds of the estate and await their accounting without any judicial interpretation of the will, the trustees are entitled to commissions upon the investments of income accumulated during the daughter's minority. The enumerated powers relating to investments conferred by the will upon the original trustees may be exercised by substituted trustees. Matter of Clement Trowbridge, 55.

3. *Missing duplicate — Probate of other duplicate directed.*— A few days after testator had made in duplicate a typewritten will he received from the scrivener one of the duplicates and took it with intention to place it in his safe-deposit box, but it was never seen again and cannot be found. *Held,* that the other duplicate, which testator had placed in his safe-deposit box where it was found after his death, was entitled to be admitted to probate. Matter of William H. Shields, 96.

4. *Where there is a right of trial by jury in two contested probate proceedings the proceedings will not be consolidated — Last will must be tried first — Surrogate's Court Act,* § 65.— Under section 2535 of the Code of Civil Procedure, now Surrogate's Court Act, section 65, consolidation presupposes the pendency of two or more proceedings, and where upon an application for an order of consolidation and for the framing of questions for a jury upon the issues of due execution, testamentary capacity and undue influence arising out of four wills alleged to have been made by decedent, it appears that no petition has been filed for the probate of either of the two intermediate instruments, the application must be denied as to them. The last will which in terms revoked all prior wills cannot be considered as codicillary to the first will and must be tried first in a separate proceeding and the application for an order of consolidation will be denied *in toto.* Matter of Cornelius S. Pinkney, 262.

5. *Husband and wife — Joint tenants — Tenants by the entirety — Widow's election to receive benefits under will of deceased husband permits title to real estate which was owned by them jointly to pass under the will of her deceased husband.*— Although decedent and his wife held certain real estate as joint tenants, which

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upon his death passed by right of survivorship to her, he assumed to dispose of the same by a will establishing a trust of his entire estate for her benefit during life and upon her death directing the payment of certain legacies, the residue to be divided into four equal parts as to each of which he created further separate trusts. By a codicil which revoked one of said trusts, created primarily for the daughter of testator, she was given, free from any rent or other charge, the use and occupancy for life of a part of the house upon said real estate, with remainder to a grandson of testator and his heirs forever. The codicil also provided that during the daughter's life, the rent of the other part of the house should be collected by the executor as part of the residuary estate and applied to the payment of taxes, insurance and repairs. At the death of the testator, provided the fair and reasonable market value of the premises did not equal one-fourth of the residuary estate, the executor was directed to pay to the daughter, in cash, the difference between the appraised value made by the executor as directed and the one-fourth part of the residuary estate. Until her death, ten years after that of her father, the daughter occupied her part of the house with the consent of her mother. Thereafter, and for a nominal consideration, the widow, who during her lifetime had accepted the income of the trust created for her by her husband's will, conveyed the premises to the devisee thereunder. In a proceeding for the judicial construction of a will, *held*, that the widow's acceptance of the income of the trust constituted an election on her part to accept the provisions of the will and to permit the premises of which she was the owner to pass under the devise thereof contained in her husband's will. The conveyance of the premises having been made with full knowledge of the facts of the situation must be taken as an open ratification of the testator's act in assuming to make the devise and as an act on the part of the widow in furtherance of her election to abide by the terms of her husband's will. In the circumstances, for the purpose of determining the amount of cash presently payable to the estate of the deceased daughter in accordance with the codicil, the premises in question must be deemed to pass to the testator's grandson by virtue of the will and a claim that the full one-quarter share of the residue is now payable to the next of kin of the deceased daughter as if the said premises formed no part of decedent's estate and were not in anywise affected by his will, is untenable. Matter of Peter Aitken, 268.

6. *Devise — Discretionary power of sale — Taxes and carrying charges on unproductive real property payable by life tenant.*— The general rule is that taxes and carrying charges on real property are payable by the life tenant and are not chargeable either upon the land, the proceeds of its sale or upon the interests of the remaindermen, unless the will expressly so directs. A will containing only a discretionary power of sale over the real estate and under which testator's widow, who was also his executrix, took a life interest in the residue of his property, real and personal, devised and bequeathed whatever was left of the residuary estate at her death, after payment of money legacies payable therefrom, to the brothers and sisters of testator in equal shares. The

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WILLS — Continued.
residuary estate consisted of about $250,000 worth of income producing real and personal property, and $160,000 worth of vacant lots producing no income. *Held,* that an objection to the payment from the principal of the estate for taxes on the unproductive property still unsold must be sustained and the account of the executor of the deceased executrix surcharged accordingly. Matter of Robert S. Fleet, 273.

7. *Non-residents — Every state has exclusive jurisdiction over property within its borders — Constitutional law — Will relating to personal property valid in state where executed may be established in New York although not entitled to probate — Code Civ. Pro.* § 1861, *subd.* 2 — *Decedent Estate Law,* §§ 200(2), 206, *added by Laws of* 1920, *chap.* 919.— Under the full faith and credit clause of the Federal Constitution, as now interpreted, every state has exclusive jurisdiction over property within its borders, and where a testator has property in more than one state, each state in its own courts, can provide for the disposition of the property, in conformity with its laws. Where the will of a non-resident of this state, relating to personal property only, is valid under the laws of the state of Virginia in which it was executed, it may be established by an action in the Supreme Court of the state of New York though it is not entitled to be admitted to probate here. (Code Civ. Pro. § 1861, subd. 2; Decedent Estate Law, §§ 200(2), 206, added by Laws of 1920, chap. 919.) Where testator and his second wife were domiciled in the state of Ohio until shortly before his death there and said will could not be proved in that state against her objection because it was holographic, and for the reason that it offended the community law of that state, her *ex parte* administration proceedings therein gave the Ohio court plenary jurisdiction over all assets the decedent left in that state. In an action by stockbrokers who held an account in favor of decedent to establish his holographic will executed in and valid under the laws of the state in which it was made, plaintiff interpleaded as defendants the Ohio administratrix as well as the executor, legatees and next of kin, viz., mother and brother, under decedent's said will, which had been admitted to probate in the state of North Carolina, where decedent was born. Several months after decedent's first wife had obtained, in West Virginia, a decree of absolute divorce but before the entry of the final judgment, decedent married his second wife and shortly after her appointment as administratrix, the mother and brother of decedent proved *ex parte* in North Carolina his holographic will, which left everything to them. *Held,* that the North Carolina court was without jurisdiction to admit the will to probate and that plaintiff was entitled to judgment establishing said instrument as the last will and testament of decedent. Hutton v. Blackburn, 434.

8. *When legacies abate — General legacies usually abate ratably when assets insufficient for full payment, in absence of intention to prefer — Trust for education of infant children preferred when other provision insufficient.*— Where general legacies are of pure bounty and there is no expression or inference to be drawn therefrom manifesting an intention to make a preferred gift, the general

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rule is that in the event of a deficiency of assets to pay them in full, the legacies abate ratably though in some circumstances the courts have found an intention to prefer without express words on the part of the testator. A testator who left no real estate and whose personal estate was largely insufficient to pay general legacies in full beqeauthed $50,000 to his executor in trust, to keep the same invested and pay the income thereof for the use and education of his three infant children, with direction that if said income was not so used, then to accumulate and add it to the principal which testator directed to be equally divided among his children when they attained the age of twenty-five years. *Held,* that while it is the law that if a legatee is otherwise provided for the legacy will abate, yet where the "other provision" is neither sufficient nor reasonable, the gift for the use of the children under the will should be preferred. Where, as here, a deed of settlement providing for the support and maintenance of decedent's wife and children did not provide for the education of the children, they are not "otherwise provided for" either in the will or the deed of settlement, for the purpose of education, and the trust for that purpose should be preferred as against the contention of the widow that all general legacies should abate, *pro rata.* Matter of George E. Neil, 498.

9. *Legacies — "Relatives" limited to those who would take under Statute of Distributions — Provisions for widow inconsistent with her taking dower — Election.*— A testator survived by his widow and two brothers and three sisters devised and bequeathed sixty per cent of all his estate, real and personal, to his wife and the balance equally to his "relatives" and in addition the wife was given all bonds and jewelry. *Held,* that "relatives" should be construed to embrace those only who would take under the Statute of Distributions in case of intestacy. The provisions of the will for the widow are inconsistent with hrr taking dower and she is put to her election. Matter of Ludwig Sobel, 508.

10. *Upon probate surrogate may determine whether after-born children, unprovided for, are entitled to share — When after-born children deemed to be mentioned in will within meaning of section* 26 *of Decedent Estate Law.*— The surrogate upon a proceeding for the probate of a will has jurisdiction to construe the instrument and adjudicate as to whether after-born children of the testator, unprovided for therein or by any settlement, are entitled to a distributive share of his estate pursuant to section 26 of the Decedent Estate Law. After the creation of a trust for the benefit of certain named persons and of testator's wife, his executrix, who if after-born children were cut off, was the sole legatee, the will provides: "In the event of my leaving legitimate issue, I annul this entire will and give, bequeath and devise to my wife my entire estate whether the same be real, personal or mixed property, to herself, her heirs, executors and assigns, in fee and absolutely free from any trust or restrictions." *Held,* that said children were mentioned in the will within the meaning of section 26 of the Decedent Estate Law and were not entitled to succeed to any portion of testator's property, pursuant to such statute. Matter of John W. Dick, 635.

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WILLS — Continued.

11. *Testator's intention must govern — When legatee entitled to income up to date of organization of corporation provided for in will — Attempted gift to corporation of income which accrued prior to its organization illegal and void.*— Where the meaning of a testator is apparent the plain import of the language of his will may not be departed from though it result in rendering the instrument invalid. It is the duty of the court in the interpretation of a will to ascertain from its language, properly interpreted, what the testator actually intended and then to determine whether intended provisions are valid. Testator, who died April 25, 1919, devised and bequeathed his residuary estate to his executors in trust, with instructions to organize, as soon after his death as practicable, and within the lifetime of his nephew and of a partner of testator, a corporation to be known as the "Juilliard Musical Foundation" and to transfer and pay over the entire capital of the trust fund to said corporation when organized, for the uses and purposes provided for in its charter. The will contained a further direction that until said corporation was organized, the executors should pay all income actually received from the trust fund to testator's nephew, but that upon such organization being effected, all distribution of income to him should cease, and that there should be no apportionment to him of income partially or wholly earned, but not yet due and payable, at the organization of the "Juilliard Musical Foundation," and in the event that the corporation was not organized or for any other reason the said testamentary provisions should be ineffectual, the entire trust fund and estate was devised and bequeathed to the "American Museum of Natural History" and to "St. John's Guild in the City of New York" in equal shares. The will gave testator's partners the right to purchase his interest in the firm, and in certain mill stocks owned by him, "upon the inventory value" and "on an inventory basis" respectively. The executors and trustees and the surviving partners as of the day of the testator's death consummated a sale of testator's interests in the partnership and in the mill stocks. Interest bearing promissory notes of the surviving partners were delivered to and accepted by the executors and trustees in accordance with the direction of the will, except as to interest dates. The "Juilliard Musical Foundation" was incorporated by the legislature March 30, 1920, and a meeting for the purpose of effecting the organization of said "Foundation" was held April 16, 1920. The notes were dated April 25, 1919, and delivered November 23, 1920. Upon the delivery of the notes the surviving partners also gave a check in payment of any and all interest due from them on account of the notes up to and including October 25, 1920, amounting to $965,471.60. Upon the judicial settlement of the accounts of the executors and trustees and for a construction of the will, the substitutionary legatees asserted claims to the amount of said check, together with certain other income from corporate or governmental securities, which accrued prior to the organization of the "Juillard Musical Foundation." *Held*, that the intent of the testator was to give to his nephew all income that was due and payable up to the date of the organization of the "Foundation" whether actually reduced to possession or not, and that the remainder of said income should go to the "Foundation." The attempted gift to the corporation of

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WILLS — Continued.
income which accrued prior to its organization constituted a direction for an illegal accumulation of income and was void. The nephew was entitled to the income on the notes and all other income that was due and payable up to the date of the meeting held for the purpose of effecting the organization of the corporation, and the testator having failed to give and bequeath the balance of said income it passed to his next of kin under the Statute of Distributions, but before a decree can be granted herein the proceeding must be amended so as to bring in such persons. The fact that the amount received on the sale of testator's interest in the firm and in the mill stocks was less than the inventory value as stated in the transfer tax proceeding conducted by his executors and trustees, does not alter the fact that the price so paid was the agreed inventory value and a compliance with the terms of the will. Matter of Augustus D. Juilliard, 642.

12. *Bequest of part of residuary estate — Direction as to payment of rents, issues and profits to widow and to son who predeceased mother leaving issue — Conveyance and transfer of one-half of trust estate to son on arriving at twenty-one years of age — "Death of my said son" refers to death either before or after mother — Children of deceased son entitled to whole corpus of trust estate in equal shares — conveyance and transfer by trustee decreed.*— Testator devised and bequeathed to a trust company one-third of his residuary estate in trust, with the following directions: To pay the rents, issues and profits thereof to his wife during her life, and upon her death to his son until he attains his majority, and thereafter during his life to pay him one-half of said rents, issues and profits; upon his arriving at the age of twenty-one years to convey, assign and deliver to him one-half of the trust estate, and "upon the death of my said son" to convey, assign and deliver all of the estate held in trust, be it the whole or one-half part thereof, to his lawful issue share and share alike or in default of such issue to his next of kin. The testator's widow survived him and though the son survived his father he predeceased his mother, leaving children him surviving. *Held,* that the words "upon the death of my said son" must be construed as referring to his death either before or after that of his mother. The children of the deceased son are therefore entitled to the whole corpus of the trust estate in equal shares and the trustee will be directed under the will to make the proper conveyance and transfer. That the son having reached his majority would immediately upon the death of his mother, the life tenant, have been entitled to one-half of the trust estate absolutely had he survived her, does not change the situation. Matter of Jabez A. Bostwick, 750.

13. *Holographic — Writing "this will revoked" across face of will effects neither a revocation nor cancellation — Decedent Estate Law,* § 34.— After the death of a testator his holographic will executed nearly fifty years ago was found in a safe deposit box with the words "Will revoked" and "This will revoked," written vertically across the face of the will, in each instance followed by his name but not those of witnesses. *Held,* that admitting that the

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WILLS — Continued.
quoted words were written by the testator, of which fact there was no conclusive proof, they were ineffectual to work either a revocation or cancellation of the will under section 34 of the Decedent Estate Law. Matter of George W. Parsons, 753.

14. *Life estate to widow not stated to be in lieu of dower — Election not required — Real Prop. Law,* § 200 *— When only entitled to income.* Matter of Edward Moeller, 803.

See **Executors and Administrators.**

WITNESS.
Effect of conviction of recanting.
See **Criminal Procedure.**

WORKMEN'S COMPENSATION LAW.
Ships and shipping — Moving steel plate in shipyard not maritime — Workmen's Compensation Law exclusive — Judgment on the pleadings — Rules of Civil Practice, 106(2), 107, 108.— While a contract of employment may be maritime in character a tort arising from the employer's violation of duty in connection with the contract, is not necessarily a maritime tort. Where the work done upon materials to be used in repairing a ship is wholly performed on land without regard to the nearness of the ship and not requiring the physical presence of the workman at any time on the ship, said work is not such performance of a maritime contract as to oust the State Industrial Commission of its jurisdiction under the Workmen's Compensation Law to make an award to an employee who is injured while doing such work. Plaintiff employed by defendant as a boiler maker and mechanic was directed by his foreman to leave his usual work and bring into the shop a heavy steel plate which was destined ultimately for use in repairing an ocean going vessel which was undergoing repairs in defendant's dry dock. While so engaged, the hoisting and other apparatus which was built on beams embedded in the ground, loosened, broke or snapped. An action against the employer, which was engaged in the business of ship building and repairing, for injuries caused by the falling of the plate upon plaintiff, was based upon the alleged negligence of the defendant in failing to furnish a safe place to work and safe appliances. *Held,* that the services plaintiff was performing when injured were not of a maritime nature within the ruling denying jurisdiction of the State Industrial Commission under the Workmen's Compensation Law. The jurisdiction of the Industrial Commission in such a case is exclusive, and where defendant's motion for judgment on the pleadings under rule 106(2) of the Rules of Civil Practice, on the ground that the court had not jurisdiction of the subject of the action, is supported by an affidavit pursuant to rule 108 from which and the complaint it is made clear and undisputed that the injuries to plaintiff occurred on land in the manner and under the conditions alleged, and the plaintiff does not avail himself of the right given by said rule 108 to present affidavits in denial of the defendant's claims, the motion will be granted. Newman v. Robins Dry Dock & Repair Co., 426.

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